75-1471

SUPREME COURT OF THE UNITED STATES

CIVIC TELECASTING CORPORATION
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
AMON G. CARTER, JR.
CAPITAL CITIES COMMUNICATIONS, INC.
NORTH TEXAS BROADCASTING CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April, 1976

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CITATIONS

PETITION FOR WRIT OF CERTIORARI

Petitioner Civic Telecasting Corporation (Civic) hereby petitions the Court to review on certiorari the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Civic Telecasting Corporation v. Federal Communications Commission, et al,* 523 F.2d 1185, entered November 28, 1975. Civic's motion for rehearing in banc was denied by order of January 8, 1976. The judgment affirmed orders of the Federal Communications Commission (FCC) which had been appealed by Civic, and this Court has jurisdiction to review such judgments by writ of certiorari under the provisions of 47 U.S.C. 402(j).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are important questions of federal law which have not been, but should be, settled by this Court:

1. Whether the FCC can properly grant the renewal of a broadcast license under the following circumstances:
   a) The applicant has been named as a co-conspirator in alleged anti-trust violations in a suit in the United States District Court,
   b) The applicant has invoked the power of the district court to prohibit disclosure to the FCC of information relating to the alleged violations which was obtained through discovery in that suit,
   c) The FCC has knowledge of the protective orders and the applicant's requests that they be entered for the purpose of prohibiting disclosures to the FCC,
   d) The FCC acquieseces in non-disclosure of the protected information, and
   e) The renewal is granted even though the protected information has not been disclosed to, or evaluated by, the FCC.
2. Whether a public interest intervenor who has petitioned the FCC to deny a broadcast license renewal, and who is seeking no license or private right, should be regarded as a complaining witness rather than an adversary who assumes the burden of proving that the renewal applicant is not qualified to be a licensee of the FCC.

3. Whether the filing of a petition to deny a broadcast renewal application relieves the FCC of any duty to evaluate all facts which are known to have a bearing on the qualifications of the renewal applicant or limits the FCC's inquiry to the facts stated in the petition to deny.

STATUTES INVOLVED

47 U.S.C. 308 (b):
All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequency and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

47 U.S.C. 309(a):
Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting therof, it shall grant such application.

47 U.S.C. 309(d)(1):
Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing; except

that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thrty days following the issuance of public notice by the Commission of the acceptance for filing of such application or any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall be similarly supported by affidavit.

47 U.S.C. 309(d)(2):
If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial or material question of fact is presented or if the Commission for any reason if unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

47 U.S.C. 309(e):
If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for

hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereof by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

STATEMENT OF THE CASE

The Petitioner herein filed with the FCC a timely petition to deny the 1971 renewal applications of three Dallas-Fort Worth broadcasters, on the basis of alleged anti-trust violations by the renewal applicants. Civic claimed standing on the basis of public interest considerations to formally protest the renewals, and did not seek any license or private right. The FCC found that Civic did have standing on that basis.[1] The petition contained information which had been obtained through discovery in an anti-trust suit against two of the renewal applicants.[2] Upon disclosure of such information to the FCC, those defendants sought protective orders from the district court to prohibit any further disclosure to the FCC of anything discovered in the antitrust suit. Such orders were entered by the court, and there were no further disclosures of any such information to the FCC, although discovery continued for approximately two years after the first protective order was entered. The protective orders prohibited disclosure to Civic as well as the FCC, notwithstanding the fact that Civic and the plaintiff in the anti-trust suit were under common ownership. At least one of the orders restricted

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1. *A. H. Belo Corp.*, 46 FCC 2d 1075, 1076. (App. 11a)

2. *UHF, Inc. v. Times Herald Printing Company, et al.*, Civil Action No. 3-4156-E in the United States District Court for the Northern District of Texas. The plaintiff in that action was owned by the owners of Civic, James T. Maxwell and Carroll H. Maxwell, Jr.

disclosure of certain information to attorneys only, and prohibited disclosure to the parties. Civic informed the FCC of the protective orders and requested that the FCC require disclosure of the protected information by the applicants. The FCC found that the protective orders "unduly inhibited Civic" and that "full and complete disclosure of all materials relating to the allegations set forth in the petition to deny is necessary to enable the Commission to effectively discharge its responsibilities under the Communications Act of 1934, as amended."[3] The FCC also stated as follows:[4]

> In this regard, it should be noted that the Commission is considering the various alternatives at its disposal, including a direct request to the United States District Court for the Northern District of Texas, Dallas Division that Civic be permitted to use the subject information in its pleadings before this Commission. In the meantime, action on the petition to deny will be deferred until such time as the Commission has sufficient information before it to discharge its statutory responsibilities.

However, the FCC never made any request to the district court or any other attempt to obtain the protected information, except through demands on Civic that it disclose the protected information. No such demand was made on the applicants by the FCC, and no disclosure was required of them. The FCC took no further action until after the parties in the anti-trust suit had entered into a settlement agreement and an agreed judgment was entered by the district court on February 1, 1974. By that time, some of the protective orders had been removed or modified, but Civic notified the FCC that it could not safely disclose the protected information until all restrictions had been removed. The FCC rejected this position as unreasonable on the part of Civic, and granted the renewal applications without making any other attempt to obtain the protected materials. The FCC said, "It is not the responsibility of this Commission...to search all the unspecified discovered material to discern that which might

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3. *A. H. Belo Corp.*, 40 FCC 2d 1136, 1137. (App. 9a).

4. *Id.* at Note 3.

lend support to inferences yet to be advanced by Civic in support of its accusations."[5] The FCC rejected all other courses of action as "unduly time-consuming", and concluded that "the public interest would best be served by resolving this proceeding on the basis of the pleadings now before us."[6] The FCC disposed of the protected materials by relying on the agreed judgment in the anti-trust suit as a dismissal on the merits based on all the material discovered and all other relevant evidence.[7] On appeal,[8] the Court of Appeals found that "the FCC appears to have mistaken the trial court's dismissal with prejudice of the settled claim as a dismissal on the merits" but nevertheless faulted Civic for not providing prima facie evidence of anti-trust violations in support of the allegations in the petition to deny[9] because Civic failed to provide the FCC with "a list of relevant documents, with appropriate sections indicated by number or title, and of the protective order preventing disclosure of each."[10] The Court of Appeals found that the FCC's action was not unreasonable only "in light of the evidence presented", but did not recognize any responsibility of the FCC to evaluate the protected information before making a determination on the applicants' character qualifications. The significance of the protected information was inferred solely from Civic's actions, without regard to the applicant's motives for requesting protective orders to prohibit disclosures to the FCC.

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5. *A. H. Belo Corp.*, 46 FCC 2d 1075, 1080. (App. 18a).
6. *Id.*
7. *Id.* at 1085. (App. 25a).
8. Pursuant to 47 U.S.C. 402 (b).
9. *Civic Telecasting Corporation v. FCC*, 523 F .2d 1185, 1189, Note 10. (App. 7a).
10. *Id.* at 1188. Civic's motion for rehearing explained the impossibility of providing such a list.

ARGUMENT

Congress has required full disclosure to the FCC of matters affecting the character qualifications of applicants for licenses,[1] and such matters clearly include violations of anti-trust laws.[2] In furtherance of this policy, the FCC has stated that it has the "positive duty" to consider such conduct in evaluating applicants,[3] whether or not any suit alleging illegal conduct has been filed or finally adjudicated.[4] Whether an applicant's activities do or do not amount to a positive violation of law, they still may impair the applicant's ability to serve the public, and must therefore be evaluated in determining an applicant's character qualifications.[5] The FCC obviously applied that policy when it found that "full and complete disclosure of all materials relating to the allegations set forth in the petition to deny is necessary for the Commission to effectively discharge its responsibilities...". However, that finding was abandoned upon settlement of the anti-trust suit against the applicants. Certainly, the mere fact of settlement could not change the responsibility which the FCC had previously recognized. "The end of private litigation hardly overrides a major public interest."[6] Nevertheless, the FCC's determination to require a full and complete disclosure was never carried out. The FCC's opinion suggests only two possible reasons for its change of course:

1) The significance of the protected information could be inferred from the entry of the agreed judgment.

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1. 47 U.S.C. 308 (b); *L. B. Wilson, Inc. v. FCC*, 397 F .2d 717, 719 (1968).
2. *National Broadcasting Company v. United States*, 319 U.S. 190, 223 (1943).
3. *Violation by Applicants of Laws of United States*, 42 FCC 2d 399, 401, Paragraph 7 (1951), citing *National Broadcasting Company v. United States*, 319 U.S. 190.
4. *Id.* at 403, Paragraph 15.
5. *Mansfield Journal Company v. FCC*, 180 F .2d 28, 33 (1950).
6. *Citizens TV Protest Committee v. FCC*, 348 F .2d 56, 60 (1965).

2) Civic unreasonably refused to come forward with the protected information.

Neither of these reasons could possibly justify the FCC's failure to consider evidence bearing on anti-trust conduct which had been actively concealed by the applicants. Since the Court of Appeals found that dismissal with prejudice of the settled claim could not be viewed as a dismissal on the merits, the only remaining reason for granting the renewals in the absence of a full and complete disclosure is simply that the parties refused to supply the protected information. In order to tolerate such a refusal by a renewal applicant, it would be necessary for the FCC to determine that the concealed information was not of decisional significance. Assuming, *arguendo,* that such a determination was made, it could not have been based on any evaluation of the concealed information, which was never disclosed. Instead, the FCC apparently ignored the circumstances under which the protective orders were entered, and demanded that Civic disclose the protected information. When that demand was not met, the FCC somehow concluded that, because of Civic's failures, the public interest no longer required consideration of the evidence in the anti-trust suit. Thus, the applicants who obtained the protective orders used the United States District Court not only to prohibit the disclosures, but to intimidate a public interest intervenor who sought to disclose material information to the FCC but did not choose to take the world on its shoulders in so doing. The Court of Appeals expressed sympathy for "Civic's frustration and uncertainty" and said, "We commend Civic for its efforts to follow to the letter the court orders binding it."[7] Nevertheless, Civic's commendable efforts to overcome the obstacles which had been created by the applicants resulted in Civic's protest being rejected and the applicants being permitted to immure all evidence in the anti-trust suit. The dangers of permitting such conduct by an applicant are obvious. The applicant's ability to conceal information from the FCC will be limited only by its desire to do so and the extent to which it can intimidate complaining witnesses. This Court long ago recognized that the FCC cannot tolerate any

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7. *Civic Telecasting Corporation v. FCC,* 523 F .2d 1185. (App. 3a).

deliberate concealment by applicants, as follows:[8]

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose. If the applicant had forthrightly refused to supply the information on the ground that it was not material, we should expect the Commission would have rejected the application and would have been sustained in so doing.

Of course, the applicants here in question also forthrightly refused to supply information on the ground that it was not material, but the Commission simply acquiesced in that refusal and disavowed any responsibility "to search all the unspecified discovered material...". Such action is clearly contrary to the requirements of 47 U.S.C. 309. As the Court of Appeals has stated,[9]

> The statute contemplates that, in appropriate cases, the Commission's inquiry will extend beyond matters alleged in the protest in order to reach any issue which may be relevant in determining the legality of the challenged grant. Clearly, then, the inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant.

Nevertheless, the FCC treated Civic's appearance as only an adversary encounter between private litigants, without regard to the FCC's statutory role as an advocate for the public interest. "However, in creating a role for private parties , Congress did not intend to relieve the Commission of its responsibilities and

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8. *Federal Communications Commission v. WOKO, Inc.* 329 U.S. 223, 227 (1946).

9. *Clarksburg Publishing Co. v. FCC,* 225 F .2d 511, 515 (1955). "This statement, made in 1955, is not affected by the 1962 amendments to 47 U.S.C. Section 309." *Citizens TV Protest Committee v. FCC,* 348 f .2d 56, 59, Note 13 (1965).

allow the parties to limit the issues, thereby leaving it in the position of a 'traffic policeman with power to consider merely the financial and technical qualifications of the applicant.' "[10] Rather than being treated as an adversary of comparable skill and resources, Civic should have been regarded as "more like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts, and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred."[11] The FCC's action in this case is a major departure from the concept that its ability to fulfill its statutory responsibilities requires voluntary disclosures by licensees and applicants of full and complete information affecting their qualifications. As the Commission has said, "no one is allowed 'one bite' at the apple of deceit."[12] The only real incentive for licensees to make voluntary disclosures of damaging information is the fear that anything concealed might be disclosed by someone else. Now, those with a propensity for deception are afforded relief from that fear and the need to make voluntary disclosures to the FCC, knowing that the FCC will turn a deaf ear to any potential informer who is restrained by a court order. If the FCC is to fulfill its function as a protector of the public interest, applicants cannot be permitted to invoke the power of local courts to control the flow of information to the FCC, as was done in this case.

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10. *L. B. Wilson, Inc. v. FCC*, 397 F .2d 717, 719 (1968); *Mansfield Journal Co. v. FCC*, 180 F .2d 28, 32 (1950), citing *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-216 (1943).

11. *Office of Communication of United Church of Christ v. FCC*, 425 F .2d 543, 546 (1969).

12. *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973).

WHEREFORE, Petitioner prays that this Court review the judgment of the Court of Appeals upon Writ of Certiorari, and require that it remand the proceedings to the Federal Communications Commission for due consideration of all matters bearing upon the character qualifications of Carter Publications, Inc.

Respectfully submitted,

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April, 1976

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CIVIC TELECASTING CORPORATION, Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION, North Texas Broadcasting Corp., Amon G. Carter, Jr., Capital Cities Communications, Inc., Intervenors.

No. 74-1952. Argued Sept. 5, 1975. Decided Nov. 28, 1975.

Appeal from the Federal Communications Commission.

James T. Maxwell, pro se.

Sheldon M. Guttmann, Counsel, FCC, with whom Ashton R. Hardy, Gen. Counsel and Joseph A. Marino, Associate Gen. Counsel, Washington, D.C., were on the brief for appellee, FCC.

J. Roger Wollenberg, Washington, D.C., with whom Joel Rosenbloom, David R. Anderson and Richard D. Paisner, Washington, D.C., were on the brief for intervenor Capital Cities Communications, Inc., Timothy N. Black, Washington, D.C., also entered an appearance for intervenor, Capital Cities Communications.

Michael Finkelstein, Washington, D.C., was on the brief for intervenor, Amon G. Carter, Jr.

Michael H. Bader and Henry A. Solomon, Washington, D.C., also entered appearances for intervenor, North Texas Broadcasting Corp.

Before TAMM, ROBINSON and MacKINNON, Circuit Judges.

PER CURIAM:

Appellant-petitioner Civic Telecasting Corporation (Civic) has urged us to declare a rule announcing a broad duty for the Federal Communications Commission (FCC) in its treatment of petitions to deny license renewals. This proposed duty would require the FCC to deny the renewal, launch its own full-scale investigation, or schedule a hearing whenever a petition to deny

failed to present facts sufficient to indicate a substantial question that the renewal would not serve the public interest, convenience and necessity. We cannot, under the facts of this case, perceive any reason for so burdening the agency.

The petition to deny, filed without supporting affidavits, alleged, *inter alia*, that the licensees had committed anti-competitive practices injurious to the public interest. Civic's principals, at the time of filing the petition were also owners of another corporation engaged in private antitrust litigation with the licensees and had obtained information in that lawsuit which they felt was relevant to the renewal application. Before Civic filed its already-prepared responsive pleading in the FCC proceedings, however, the antitrust defendants obtained a protective order on September 30, 1971, limiting use of discovered information to the antitrust suit. A second protective order was issued on February 2, 1972, modifying the September 30 order and stating that all discovered information which the court found to be confidential could not be revealed except in preparation for the trial. In order to allow Civic further time to present the information it had obtained the FCC granted an indefinite extension so that Civic could complete its previously-filed pleadings.

In the two years that followed, attempts were made by Civic and the licensees to get the information released for presentation before the FCC.[1] Finally in 1974 the FCC determined that Civic could respond without fear of being held in contempt of court and allowed Civic 15 days in which to complete its reply and to furnish the Commission with the facts which Civic insisted were relevant to the license renewal. Civic still refused to come forward with the information and, more important, made no effort

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1. The antitrust defendants sought a clarification order of prior protective orders. This clarification belatedly stated that Civic could have disclosed information already used or revealed before the September 30 order in the period between Protective Orders 1 and 2. One licensee, Carter, obtained a court release of the protective orders as to information discovered *from* him. Following settlement and dismissal of the antitrust action in December, 1973, two other companies obtained release of protective orders governing confidential material obtained from them. Furthermore, licensee Belo agreed in a letter to the FCC and Civic to allow use of protected material before the FCC, but indicated that it wished to retain the protective order to prohibit other uses of the information.

to accept the FCC's recommended alternative of indicating which documents were protected and necessary for complete agency review. The FCC subsequently ruled on facts currently before it and found no reason to deny the renewal application or to call for a hearing on a substantial issue. More than a week after the decision, Civic wrote to the trial court requesting permission to use information obtained from Belo that Belo had previously offered to Civic and the FCC. At that point, however, Belo no longer was willing to divulge confidential information since its application had been granted. One month following the renewal grant, Civic filed a petition for reconsideration, presenting no newly-discovered or newly-released information but alleging that Belo's subsequent change of heart proved its insincerity in offering to allow use of the information for consideration of the renewal application. The FCC denied this petition for reconsideration and Civic appealed to this court.[2]

This case, despite its complex factual setting, presents only two serious issues: (1) whether the FCC correctly determined that Civic had unreasonably refused to come forward with the promised damaging information to support its allegations; and (2) whether, on the facts and allegations before it, the FCC could reasonably have granted the renewal without a hearing.[3] We affirm the Commission's actions in both respects.

We sympathize with Civic's frustration and uncertainty at the piecemeal release of information in its possession; similarly, we commend Civic for its efforts to follow to the letter the court orders binding it. Despite these facts, however, we agree that the FCC acted reasonably in March, 1974, when it granted the

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2. The appeal in this court technically challenges only the orders granting renewal and assignment of the license of Carter Publications, Inc., 46 F.C.C.2d 1075, *reconsideration denied*, 48 F.C.C.2d 669 (1974); 46 F.C.C.2d 1099, *reconsideration denied*, 48 F.C.C.2d 693 (1974). The issues presented, however, concern the renewal applications of both Carter and Belo. For this reason the memorandum will not distinguish between the applications.

3. This memorandum omits any discussion of factual issues as to the license assignment raised for the first time by Civic's supplemental brief in this appeal. These are the types of specific data that should have been addressed to the FCC, no later than in Civic's petition for rehearing. This court is not the proper forum for examination and resolution of factual issues never presented for FCC consideration.

license applications after Civic failed either to complete its responsive pleadings or to identify protected information.

Civic, proceeding *pro se* in its petition to deny, had by that time received court release of most protected evidence. Although Civic feared, perhaps justifiably, to rely on Belo's offer of limited use of the materials,[4] it made no timely efforts to seek clarification[5] from the court, waiting instead until after the reply time had run and the FCC had granted the renewal. Contrary to Civic's assertions, Belo's reluctance at that late date to assist Civic in further resistance to the renewal does not prove that its prior offer to allow use of the information in order to facilitate an FCC decision on the application was disingenuous.

Even if Civic's overly cautious refusal to rely on Belo's release was justified by fear of possible court action, we find no reasonable basis for Civic's failure to provide the FCC a list of relevant documents, with appropriate sections indicated by number or title, and of the protective order preventing disclosure of each. This alternative, recommended by the FCC in its telegram of March 13, 1974, would have allowed the FCC some basis for belief that the damaging information did exist but could not be presented safely by the petitioner for denial. It should also have alleviated Civic's concern regarding information discovered from non-parties. Furthermore, Civic could not reasonably have feared that listing documents by number or title would have violated the court order.

Instead of accepting this alternative, Civic did nothing to complete its pleadings. Civic now claims that, despite its failure to present specific information, the FCC should have launched an

4. Civic's real fear seemed to be that contempt proceedings would be *brought*, not that they would be successful. In its letter of March 15, 1974, to the FCC, Civic stated that "there is no assurance that such disclosure would not result in efforts to have us held in contempt of court . . . We sincerely regret this misunderstanding, but we are not in a position to risk contempt of court, or to dissipate our resources in opposition to motions to hold us in comtempt."

5. Civic's informal manner of addressing a letter, rather than a motion, to the court was perhaps imprudent, but not totally unreasonable in light of the informal example set by counsel for plaintiff and defendants in the antitrust action. *See* App. at 43-1 to -5.

investigation or committed the necessary manpower to obtain and examine all the discovery materials uncovered in the antitrust suit. Civic's suggestion would not only place an impossible burden on the FCC[6] but it would also contravene the license renewal procedures outlined in the Communications Act, 47 U.S.C. Section 151 *et seq.* (1970), and the regulations promulgated thereunder.

Section 309(d) of the Act prescribes rules for the timeliness and contents of petitions to deny license applications. These requirements, echoed in Regulation 1.580, extend to petitions to deny renewal applications, and require specific allegations, supported by affidavits, that are sufficient to make a prima facie showing that renewal is inconsistent with public interest, convenience, and necessity.[7] Section 309(d)(2) of the Communications Act also notes that the Commission's basis for granting the application and denying a hearing will be "the application, the pleadings filed, or other matters which it may officially notice."

We have previously acknowledged the need for demanding compliance with procedural aspects of FCC actions in order to protect the interests of orderly administration and finality.[8] This

6. As the FCC pointed out in another case in which the petition for denial of renewal failed to provide specific information to the FCC,

> [t]here are 8,230 licensed radio and television stations in the United States. During fiscal year 1972 the Commission received approximately 44,681 complaints, comments and inquiries concerning these stations. If we were required to make detailed findings on every complaint where specific facts are not explicitly stated, our administrative task would be enormous.

In re Storer Broadcasting Co., 41 F.C.C.2d 792, 799(1973).

7. 47 C.F.R. Section 1.580(i) provides in relevant part:

> Petitions to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party, in interest, and that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

8. Congress clearly recognized that sound regulation has procedural as well as substantive elements, and that "the public interest, convenience, and necessity" comprehends both. Orderliness, expedition, and finality in the adjudicating process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own.

requirement of specificity has often been upheld by the FCC. *See, e. g., In re Scott Broadcasting Corp.*, 52 F.C.C.2d 1029 (1975); *In re Midland Broadcasters, Inc., et al.*, 48 F.C.C.2d 195 (1974), *reconsideration denied*, 51 F.C.C.2d 1018 (1975).

In this case, the FCC's unwillingness to prolong the renewal decision past the time when Civic could have completed its pleadings evidences proper regard for these administrative interests and Congressional determinations of procedure. We agree that Civic's refusal to complete its responsive pleadings left the FCC no option but to rule on the renewal application based on the information before it.

This determination leaves only the question of whether the FCC properly decided that the renewals should be granted and that no substantial and material issues existed which required a hearing.[9] Our review of the FCC's determination of renewal applications is necessarily narrow to give proper effect to the agency's expertise; we may overturn these orders only if they are outside the requisite zone of reasonableness. *See, e. g., West Michigan Telecasters, Inc. v. FCC*, 130 U.S.App.D.C. 39, 396 F.2d 688, 691 (1968).

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9. 47 C.F.R. Section 1.59(a) (1974) provides:

(a) In the case of any application for an instrument of authorization other than a license pursuant to a construction permit,the Commission will make the grant if it finds (on the basis of the application, the pleadings filed, or other matters which it may officially notice) that the application presents no substantial and material question of fact and meets the following requirements:
(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section;
(2) The applicant is legally, technically, financially, and otherwise qualified;
(3) The applicant is not in violation of provisions of law or this chapter or established policies of the Commission; and
(4) A grant of the application would otherwise serve the public interest, convenience, and necessity.

The FCC's detailed analyses rejecting Civic's claims of obstruction of CATV and UHF development concealment of CATV activities, and antitrust violations[10] are clearly not unreasonable in light of the evidence presented. In addition, since Civic's incomplete reply did not present a prima facie case that the renewal would be inconsistent with the public interest, convenience and necessity, the FCC accurately determined that there were no substantial and material issues requiring a hearing. *See Stone v. F.C.C.*, 151 U.S.App.D.C. 145, 466 F.2d 316, 322-23 (1972); *In re Zenith Radio Corp. & GCC Communications of Chicago, Inc.*, 40 F.C.C.2d 223, 224 (1973).

For these reasons, we affirm the appealed orders of the FCC.

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10. Although the FCC appears to have mistaken the trial court's dismissal with prejudice of the settled claim as a dismissal on the merits, its conclusion that there is no prima facie evidence of antitrust violations is nevertheless reasonable in light of Civic's unsupported allegations and the licensees' answers to the petition.

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of
A. H. BELO CORP.
For Renewal of Licenses for Stations WFAA, WFAA-FM and WFAA-TV Dallas, Tex., File Nos. BR-395, BRH-1192, BRCT-33
BEAUMONT TELEVISION CORP.
For renewal of License for Station KFDM-TV Beaumont, Tex., File No. BRCT-556
THE TIMES HERALD PRINTING CO.
For Renewal of License for Station KDFW-TV Dallas, Tex., File No. BRCT-85
CARTER PUBLICATIONS, INC'
For Renewal of Licenses for Stations WBAP, WBAP-FM and WBAP-TV Fort Worth, Tex., File Nos. BR-404, BRH-539, BRCT-27

ORDER

No. F.C.C. 73-543. (Adopted May 23, 1973; Released May 24, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOOKS ABSENT'

1. The Commissioner has before it for consideration an application for review of an action taken on October 27, 1971, by the Broadcast Bureau pursuant to delegated authority.[1]

2. Among other things, the action complained of directed Civic Telecasting Corporation (Civic) to respond within twenty-six days to the oppositions to the petition to deny which Civic had filed against the above-captioned license renewal applications. In so doing, the Broadcast Bureau also denied Civic's request that

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1. The application for review of action taken pursuant to delegated authority was filed on November 1, 1971, by Civic Telecasting Corporation. Pleadings in opposition thereto were filed on November 12 and 15, 1971, by The Times Herald Printing Company, Carter Publications, Inc., A. H. Belo Corporation, and Beaumont Television Corporation. A reply to the oppositions was filed December 1, 1971, by Civic Telecasting Corporation.

the time for filing its responsive pleading be extended until fifteen days after removal or modification of a protective order issued by the United States District Court for the Northern District of Texas, Dallas Division in Civil Action No. 3-4156-A, to wit:

ORDERED AND DECREED that all exhibits, testimony and discovery in this cause shall be used in this cause only and not in any other proceeding.

3. It appears that the action complained of has unduly inhibited Civic in responding to the oppositions of the above-noted licensees and that Civic's attempts to have the court's protective order vacated or modified to permit usage of the information obtained in the court action in its presentations to the Commission have not been successful. It further appears from our preliminary examination of the pleadings before us that full and complete disclosure of all materials relating to the allegations set forth in the petition to deny is necessary to enable the Commission to effectively discharge its responsibilities under the Communications Act of 1934, as amended.[2]

4. Accordingly, IT IS ORDERED, That the aforementioned application for review IS GRANTED; that the action complained of IS SET ASIDE; and that Civic Telecasting Corporation WILL BE ACCORDED an additional period of time within which to perfect its responsive pleading.[3]

FEDERAL COMMUNICATIONS COMMISSION,
Ben F. Waple, *Secretary*.

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2. With respect to the nature of the allegations before us, see paragraph 5 of FCC 73-542, adopted this date.

3. In this regard, it should be noted that the Commission is considering the various alternatives at its disposal, including a direct request to the United States District Court for the Northern District of Texas, Dallas Division that Civic be permitted to use the subject information in its pleadings before this Commission. In the meantime, action on the petition to deny will be deferred until such time as the Commission has sufficient information before it to discharge its statutory responsibilities.

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of
THE A. H. BELO CORP., WFAA-AM-FM-TV, DALLAS, Tex.,
File Nos. BR-395, BRH-1192, BRCT-33
BEAUMONT TELEVISION CORP., KFDM-TV, BEAUMONT,
TEX., File No. BRCT-556
THE TIMES HERALD PRINTING CO., KDFW-TV, DALLAS,
TEX., File No. BRCT-85
CARTER PUBLICATIONS, INC., WBAP-AM-FM-TV, FORT
WORTH, TEX., File Nos. BR-404, BRH-539, BRCT-27
For Renewal of Broadcast Licenses

MEMORANDUM OPINION AND ORDER

No. F.C.C. 74-489. (Adopted May 13, 1974; Released May 16, 1974)

BY THE COMMISSION: CHAIRMAN WILEY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT; COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it for consideration: (a) the above-captioned applications for renewal of license; (b) a petition to deny the aforenoted renewal applications filed by Civic Telecasting Corporation,[1] and (c) various responsive and related

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1. Civic Telecasting Corporation (Civic) is a Texas corporation formed for the purpose of operating a broadcast facility in Dallas, Texas. Civic is owned by James T. Maxwell and Carroll H. Maxwell, Jr., who were officers, directors and controlling stockholders of Maxwell Electronics Corporation, the former permittee of Station KMEC-TV (Channel 33), Dallas, Texas.

pleadings.[2]

2. Before turning to the substantive allegations set forth in the instant pleadings, there are a few matters that warrant our initial consideration. First, the licensees herein maintain that petitioner lacks the requisite standing to formally protest their renewal applications, contending that Civic's interest as a prospective competitor of the licensees does not qualify it as a party in interest. Nor can Civic, argue the licensees, establish its standing derivatively through its principals, the Maxwell brothers. Civic, on the other hand, submits that there are compelling public interest considerations providing more than adequate support for its standing as a party in interest and that as a former competitor of the licensees it is uniquely qualified to bring significant information concerning the licensees to the Commission's attention. It appears from the information before us that the Maxwells are residents of Dallas, Texas and, as such, are presumably members of the listening and viewing audience of the licensees' stations. The Commission therefore finds that Civic does have standing within the purview of Section 309(d)(1) of the Communications Act of 1943, as amended. See *Central States Broadcasting, Inc.*, 37 FCC 2d 500 (1972). Were we to hold otherwise, the nature of the matters raised would nevertheless lead the Commission to

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2. During the pendency of this proceeding, various events have occurred regarding the above licensees and their stations. For example, on May 23, 1973 the WFAA licenses were assigned with Commission approval from A. H. Belo Corporation (Belo) to its wholly-owned subsidiary Beaumont Television Corporation (Beaumont), and control of Beaumont was transferred to James M. Moroney, Jr., Joseph M. Dealey and Myron F. Shapiro, voting trustees. See 41 FCC 2d 245, reconsideration denied 43 FCC 2d 336 and 43 FCC 2d 340 (1973). Also on June 6, 1973, the corporate name of Beaumont was changed to Belo Broadcasting Corporation, and on January 12, 1973 and September 25, 1973, respectively, the call letters of Station WBAP-FM and Station WFAA-FM were changed to KSCS(FM) and KZEW(FM). For the sake of clarity, we shall continue herein to refer to Belo as the licensee of radio and television Stations WFAA and to Beaumont as the licensee of Station KFDM-TV. Similarly, we shall use the former call letters of Stations KSCS(FM) and KZEW(FM) in referring to these stations.

similarly consider the instant petition on its merits.[3] See Rule 1.587.

3. The other preliminary matter involves a civil antitrust action and its bearing upon this proceeding. On September 9, 1970, the principals of the petitioner, acting through UHF, Inc., instituted a civil antitrust suit in the United States District Court for the Northern District of Texas, Dallas Division (Civil Action No. 3-4156-A), charging among others, Belo and Times Herald with violations of the Sherman Anti-trust Act by entering into a contract, combination or conspiracy in restraint of trade, by attempting to and monopolizing the television broadcast industry in the Dallas-Fort Worth metropolitan area, and by seeking to and precluding the plaintiff from competing in such market. The complainant further charged that in furtherance of the alleged restraint of trade the above defendants have (1) opposed the granting of cable television (CATV) rights to their parties, attempted to delay CATV development in the Dallas metropolitan area and, at the same time, sought to maintain the exclusive right to provide CATV services at a date of their choosing, if ever; and (2) discriminated against UHF television broadcast Station KMEC, Dallas, Texas, by failing to provide in their respective newspapers of general circulation program listings equivalent to those accorded VHF television broadcast stations in the Dallas-Fort Worth metropolitan area. Carter Publications, Inc. (Carter), the licensee of Stations WBAP, WBAP-FM and WBAP-TV, Fort Worth, Texas, was not made a defendant in this

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3. The Times Herald Printing Co. (Times Herald), the licensee of Station KDFW-TV, Dallas, Texas, submits that the petition should be summarily denied with respect to its station since the activities complained of occurred prior to its acquisition of Station KDFW-TV and the commencement of broadcast operations on July 1, 1970. It is alleged by Civic, however, that the licensee and Station KDFW-TV have continued to be operated and managed by essentially the same personnel whose activities formed the basis of the petition to deny, and that the stockholders of the former licensee by exchanging their holdings for ownership interests in Time Herald's parent corporation have maintained virtually the same relationship with the present licensee, notwithstanding the intervening assignment of the KDFW-TV license. In view of the foregoing, we will not limit our consideration of the subject petition as suggested by Times Herald.

action; however, it was named as a co-conspirator.[4] Essentially on the same grounds raised in its principals' civil antitrust complaint Civic formally petitioned to deny the aforenoted license renewal applications.

4. Subsequent to the filing of the instant petition to deny, Belo and Times Herald requested the Court to issue a protective order regarding the materials discovered from them in that proceeding. Over the objections of the plaintiff, the Court on September 30, 1971 ordered that "all exhibits, testimony and discovery in this cause shall be used in this cause only and not in any other proceeding." Arguing that its pleading in response to the licensees' oppositions to the instant petition contained references to material restricted by the Court's protective order and that it was therefore precluded from submitting that pleading to the Commission, Civic requested that the time for filing its reply be extended until fifteen days after removal or appropriate modification of the September 30, 1971 order or until final disposition of the civil action, whichever occurred first. The licensees opposed Civic's request and proffered their interpretation of the scope of the Court's protective order. On October 27, 1971, the Broadcast Bureau, pursuant to delegated authority, denied the requested extension of time and directed Civic to submit its reply pleading on or before November 22, 1971. Civic timely tendered its responsive pleading; however, those portions of the reply which allegedly referred to material subject to the protective order, were deleted and the notation, "Restricted by Court Order," inserted in their place.

5. Civic also appealed the Broadcast Bureau's denial of the requested extension of time. The licensees opposed the appli-

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4. Belo's newspaper interests in the Dallas area include the *Dallas Morning News*, which is published each morning on weekdays and Sundays , and several daily newspapers, which are published through its wholly-owned subsidiary, News-Texas, Inc., in a number of suburban communities. *The Dallas Times Herald*, an evening and Sunday newspaper with the largest circulation in the Dallas metropolitan area, is published by Times Herald. Finally, Carter publishes the *Fort Worth Star Telegram* (a morning, evening and Sunday newspaper) and controls Citizen-Journal, Inc. and the Tribune Printing Company, Inc., which publish several suburban newspapers in the Dallas-Fort Worth area.

cation for review and reiterated their interpretations of the scope of the Court's protective order. By Order of May 23, 1973, the Commission granted that appeal and set aside the action complained of, stating that Civic appeared to have been unduly inhibited in responding to the licensees' oppositions and that Civic's attempts to have the Court's protective order vacated or modified appeared to have been unsuccessful. 40 FCC 2d 1136. We also indicated that Civic would be accorded an additional period of time within which to perfect its responsive pleading and that action on the petition to deny would be deferred while the Commission explored the alternatives at its disposal which would enable Civic to use the subject information in its pleadings before this agency. Following the Commission's action of May 23, 1973, Belo requested the Court to modify the September 30, 1971 order and clearly indicate that Civic was not precluded from referring in its responsive pleading to any of the protected material that had earlier been disclosed or used in the parties' submission to the Commission. Times Herald and Carter, on the other hand, urged the Court to permit the unrestricted use of all materials, which had been discovered from the defendants and Carter. in the pleadings before this agency. A similar request was made by Civic. However, on June 11, 1973, the Court ruled that the information obtained through discovery in that action could be used in the Commission proceedings instituted by Civic provided the information had been disclosed or used in such proceedings prior to September 30, 1971.[5] The Court also pointed out that since September 30, 1971 there had been no limitations placed upon the utilization of information discovered in that action except for the restrictions imposed upon material found to be confidential within the mean-

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5. The Court's action occasioned an additional series of pleadings wherein the licensees and Civic not only debated the effect of that action on Civic's ability to perfect its responsive pleading, but also exchanged charges and countercharges concerning the propriety of their respective positions. The Commission has carefully reviewed all of these pleadings, including those which allegedly were not filed in accordance with Rule 1.45(c). In short, we find that the arguments and contentions of the parties have not exceeded the bounds of permissible advocacy and that there has been no abuse of our processes or lack of candor on the part of either Civic or any of the licensees.

ing of Discovery Order No. 2 which had been entered by the Court on February 8, 1972.[6]

6. On December 21, 1973, the Commission was advised that to avoid further large outlays of time, inconvenience and expense, the parties to the civil antitrust action had entered into an agreement looking toward a compromise and settlement of that case upon payment by Belo, Times Herald, and Carter of the sum of $487,500 plus the fee to be awarded the special master for discovery. It was also provided that neither the agreement nor the fact of payment thereunder was in any manner intended as evidence that the aforenoted licensees were guilty of any of the conduct alleged against them in the civil antitrust action. After consideration of the compromise and settlement agreement the matter discovered, and other evidence presented in the civil antitrust action, the Court concluded that there was insufficient evidence of probative value to establish that the licensees, individually or in concert, had engaged in any actions alleged by plaintiff's complaint to be in violation of the antitrust laws or that they had engaged in unfair competitive practices against the plaintiff's successor-in-interest, and so entered its judgment on February 1, 1974. On that date, the Court, acting at the request of Times Herald, modified its earlier orders, holding that "the parties hereto shall not be prohibited from disclosing any information, document or material discovered" from that defendant. A similar order had previously been requested and obtained by Carter on July 5, 1973. Belo, on the other hand , did not request the Court to terminate the September 30, 1971 protective order or any of the subsequent orders entered pursuant to Discovery Order No. 2. Its only objective with request to the continuation of the outstanding orders, claimed Belo, was to insure preservation of the confidential character of certain material, such as the licensee's annual financial reports (FCC Form 324), which had been furnished during the course of the civic action. Belo, how-

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6. Discovery Order No. 2 provides that all papers and records to which an objection was made and sustained on the sole grounds of confidentiality may be inspected by counsel, for the parties, but that disclosure of such documents, except to persons assisting counsel in the case, is prohibited. A similar restriction is imposed by this order upon all testimony to which an objection was made and sustained on the sole grounds of confidentiality.

ever, acknowledged its willingness to forward such material to the Commission, if so requested. (The licensees' voluntary submission of all discovered material had previously been advocated by Civic.) Belo further indicated that it would interpose no objection to Civic's use of material "in a filing with the Commission which requests that such material be kept confidential by the Commission...unless and until the Commission should decide the public interest requires that it be made public."

7. In light of these developments, the Chief of the Broadcast Bureau, by letter of February 13, 1974, accorded Civic a fifteen-day period within which to perfect its responsive pleading. Civic was also advised that no additional extensions of time were contemplated in view of the protracted nature of the proceeding. By letter, dated February 25, 1974, Civic responded to the Broadcast Bureau's letter, maintaining that it was presently unable to perfect its responsive pleading. "As the situation now stands," noted Civic, "Civic Telecasting Corporation is not prohibited from disclosing information discovered from Carter Publications, Inc. and The Times Herald Printing Company." However, Civic argues that the Court's protective orders remained in effect with respect to Belo and that the Court had not evidenced any intent that said orders could unilaterally be altered by Belo. Since a complete and full disclosure against all of the licensees was still restricted by the Court's outstanding orders, Civic submitted that it was inappropriate to establish a deadline for the filing of its final reply pleading.

8. On March 7, 1974, the Chief of the Broadcast Bureau's Renewal Branch contacted James T. Maxwell by telephone and discussed the manner in which Civic should perfect its reply pleading by the extended filing date of March 18, 1974. By night letter of March 12, 1974, the Chief of the Broadcast Bureau formalized the matters discussed in that conversation. After noting petitioner's position as reflected in its February 25. 1974 letter, the Chief of the Broadcast Bureau stated:

> We are not persuaded that the public interest would be served by further deferring Commission action on the aforementioned petition to deny. The restrictions governing the use of any information, document or material discovered in the civil action from Carter Publications, Inc. and The Times

Herald Printing Company have been completely removed. The limitation concerning the use of material similarly discovered from the licensee of radio and television stations WFAA has been clarified and it does not appear to unduly inhibit your ability to reply to that licensee's opposition pleading. Accordingly, you are hereby directed to perfect your responsive pleading on or before March 18, 1974. As required by Rule 1.45, your reply pleading is limited to the matters raised in the licensees' oppositions. If the factual information upon which you rely is, in your opinion, premised upon material still protected by outstanding orders of the Court, you should appropriately identify the restricted material and the relevant Court order.

You have indicated that you may seek to appraise the Commission of material and substantial matters not heretofore raised against these licensees. In the event that you do so, such a filing would be governed by Section 1.45(c) of the Rules, which requires submission of a separate motion for leave to file together with the additional pleading. Again, if the factual information upon which you rely is premised upon material protected by outstnading Court orders, you should appropriately identify the restricted material and the relevant Court order.

9. In response to this letter Civic's president, James T. Maxwell, informed the Commission on March 18, 1974 that although he had indicated otherwise in the March 7 telephone conversation, Civic would not perfect its responsive pleading. "Upon further reading of the Court's order relating to this subject," related Civic, "we do not believe that such a filing is permitted." To disclose information discovered from Times Herald and Carter without simultaneously disclosing information that had also been discovered from Belo would be difficult, argued Civic. Since it lacked assurance that any disclosure on its part would not result in efforts to have it held in contempt of court, the petitioner declined to comply with the Broadcast Bureau's directives to perfect the responsive pleading.

10. As the situation now stands, Civic has yet to perfect its responsive pleading. However, the Commission does not believe that the public interest would be served by continuing to defer action on the petition to deny which was filed nearly three years

ago. We can temporize no longer. At some point our deliberations must be brought to a conclusion and our statutory responsibilities discharges; we believe that point has been reached here. All judicial restrictions on the use of information and materials from Times Herald and Carter in the civil antitrust suit have been removed. And, petitioner has acknowledged the absence of any impediment to the perfection of its pleading with respect to those licensees. The matters discovered from Belo are somewhat limited by the Court's outstanding orders; however, we are in accord with the Broadcast Bureau that such limitations do not appear to unduly inhibit Civic's ability to reply to the matters set forth in Belo's opposition pleading. Civic disagrees. Despite the Broadcast Bureau's directives, petitioner has not identified the protected material and the relevant Court order, which it feels would support the factual information upon which are premised its arguments regarding Belo. Nor has it made any attempt to respond to the Times Herald and Carter opposition pleadings within the periods specified by the Broadcast Bureau. We recognize Civic's difficulty in pleading in such a fashion; however, this inconvenience was necessitated by judicial action and the manner of proceeding prescribed by the Broadcast Bureau was a reasonable accommodation of the Court's interest, without any prejudice to Civic. Petitioner's unwillingness to perfect its responsive pleading as directed by the Broadcast Bureau is unresonable, and the Commission will not allow this proceeding to be further prolonged. It has been suggested that Belo should furnish for the Commission's perusal all the matters discovered from that defendant in the antitrust proceeding. It is not the responsibility of this Commission, however, to search all the unspecified discovered material to discern that which might lend support to inferences yet to be advanced by Civic in substantiation of its accusations. Notwithstanding its questionable appropriateness, this course of action would undoubtedly occasion additional series of pleadings and further prolong this protracted proceeding. The other suggested courses of action available to the Commission also appear to be unduly time-consuming. Under these circumstances we must conclude that the public interest would best be served by resolving this proceeding on the basis of the pleadings now before us.

11. As previously indicated, Civic formally petitioned to deny

the aforenoted license renewal applications largely on the same grounds raised in its principals' civil antitrust suit. Specifically, Civic contends that Belo, Times Herald and Carter have conspired to delay or prevent the entrance of CATV into the Dallas-Fort Worth area so as to preserve their virtual monopoly of that television market and that these same conspirators have also sought to eliminate UHF stations as potential competitors to their own newspaper and broadcast operations. It is further alleged that Belo and Times Herald conspried to conceal from the Commission information which Belo regarded as decisionally significant with respect to its application for transfer of control of Station KFDM-TV. Petitioner's contentions will be treated seriatim.

OBSTRUCTION OF CATV DEVELOPMENT

12. According to Civic, Carter sought CATV franchises in its community of license, Fort Worth, and in fourteen other Tarrant County communities in mid-December, 1965. A few weeks later, Belo and Times Herald acting through Hill Tower, Inc.,[7] applied for CATV franchises in eighteen communities in Dallas County and in several other nearby counties. "There is no city in which *both* Carter and Hill Tower applied," notes Civic, "even though Dallas and Tarrant are immediately adjacent to one another." That such a division of the Dallas-Fort Worth market was the result of a conspiracy between Carter and the Hill Tower licensees is further confirmed in Civic's opinion by the fact that management-level employees of Carter and Belo met and discussed CATV development in that market. In support thereof, petitioner supplies excerpt from several intra-corporate memos of various principals of Belo. A portion of a November, 1965 memo from the vice president and general manager of Station WFAA-TV, Mr. Myron "Mike" Shapiro, detailed a meeting between the author and representatives of Carter who "renewed the pitch that the existing TV stations in the Dallas-Fort Worth market file for a CATV permit to at least get in the record before someone else does." In another excerpt of like import,

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7. Hill Tower, Inc. (Hill Tower), in which Belo and Times Herald have equal 50% interests, owns the antenna farm facilities located at Cedar Hill, Texas, which are utilized by the Dallas-Fort Worth broadcasters.

Mr. John S. Tyler of Carter Cable Company is reported to have urged Belo to seek a franchise in a nearby community and to have expressed the opinion that Carter and Belo should simultaneously file for franchises in Dallas, Fort Worth, and all surrounding communities. In petitioner's view, the relationship between Belo and Times Herald and the meetings between Carter and the Hill Tower licensees completely negate the possibility that these licensees might have acted independently of each other.

13. Civic further alleges that Belo and Times Herald had no intention of constructing any CATV systems in the area, unless compelled to do so to prevent construction by someone else. Rather, argues petitioner, the licensees' plan was to forestall the development of CATV by filing franchise applications in area communities and then requesting the municipalities to postpone action on the applications. As an example, Civic states that in August of 1968 when Hill Tower was informed that a competing request had been made for a CATV franchise in Richardson, Texas, it renewed its two-year old request, but suggested to the municipality that "all franchise requests be tabled until such time as legislative, judicial and administrative positions on the federal level are clarified to the satisfaction of the applicants and the Council." Hill Tower is also alleged to have earlier acted in the same manner when its 22-month old franchise application for Mesquite, Texas was faced with a competing application.[8] More than five years have elapsed since Hill Tower applied for CATV franchises, maintains Civic, and "no construction was ever begun, or even specifically planned or proposed."

14. The licensees oppose the petition to deny, contending that Civic has extracted material out of context in a vain attempt to substantiate its claim of an anti-CATV conspiracy. Specifically, Carter submits that the omitted portions of the Shapiro memorandum reflect that Carter refused to identify for Belo the communities in which it was considering CATV

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8. According to Civic, this competing application was defeated by a tie vote, which was partially caused by the abstention of a council member who was a Times Herald employee.

ventures[9] and that the omitted portions of the other Belo memo reported a discussion concerning the possibility of a CATV partnership between Belo and Carter. It is obvious, argues Carter, that there could not be a conspiracy to divide the Dallas-Fort Worth market where one of the parties to the alleged conspiracy would not inform the other where it was applying for CATV franchises, and where one of the alleged conspirators was at the same time suggesting a joint venture in which both licensees would apply together for the same communities. In further support of its position, Carter submits the affidavit of its controller, one of the participants in the aforementioned meeting with Belo officials, who avers that there was no understanding or discussion which, directly or by implication, related to methods by which Belo and Carter could divide the market and apply for CATV franchises, and that all decisions concerning the communities to which Carter would submit franchise requests were arrived at independently of either Belo or Times Herald.[10] The affiant also confirms Carter's explanation that the determination to focus its CATV activities in Tarrant County was prompted by the separation of interests and the long-standing rivalry between Tarrant and Dallas Counties which, in Carter's opinion, was largely responsible for the lack of any appreciable circulation of its newspaper in Dallas County. The Hill Tower licensees also

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9. In his November 18, 1965 memo, Mr. Shapiro had also reported that:

> Carter Cable is currently applying for, by themselves or in connection with other individuals, CATV franchises in about 15 cities. I tried to find out what cities but they were noncommittal. They did say some of the applications were in two station markets, some in towns of 6,000, some in towns of 600,000. Some of their deals are for franchises to build: some are apparently to buy existing systems and the area involved supposedly is all the way to the east coast.

10. Belo and Times Herald, on the other hand, acknowledged that through Hill Tower they jointly explored CATV prospects in the Dallas area. However, they submit that the willingness of competing television licensees to engage in a joint CATV venture during the years here in question does not adversely reflect upon their qualifications to remain Commission licensees nor does it raise an issue requiring a hearing on their license renewal applications.

point to the inter-city and inter-county rivalry as one of the factors influencing their selection of communities for possible CATV ventures. Other factors that governed this selection, indicated the former president of Hill Tower in his September 9, 1971 affidavit, were system design considerations, local bias in favor of hometown enterprises, and the economic familiarity of Hill Tower's principals with the communities in Dallas County.

15. The Hill Tower licensees also deny that they never intended to implement their CATV plans for the Dallas area. Hill Tower's caution in undertaking a 25 to 30 million dollar investment was understandable, argues Belo, in light of uncertain economic conditions and the state of flux of the Commission's jurisdiction and regulatory policies in this area. Belo and Times Herald further allege that soon after they decided to jointly pursue the acquisition of CATV interests, they wrote to a number of surrounding communities announcing their intention to develop local CATV systems and discussed with several municipalities the nature of a CATV ordinance which they thought would be appropriate. It is reported that a full-time CATV manager was hired by Hill Tower; that a feasibility study of a pilot CATV project was prepared by Hill Tower's engineering consultant; and that cost evaluation studies and market surveys were conducted under Hill Tower's auspices. As a result of these latter studies, Hill Tower allegedly found "higher than anticipated construction costs and disappointing market surveys which indicated that there were serious questions as to the feasibility of CATV operation in an area with a plethora of local stations." It is noted that in the meantime the Commission adopted regulations in March of 1966 which raised substantial obstacles to Hill Tower's planned importation of signals from stations outside the Dallas-Fort Worth television market (see *Second CATV Report and Order*, 2FCC2d 725), and in December of 1968, it proposed a ban on the ownership of CATV systems by co-located television licensees (see *Notice of Proposed Rulemaking and Notice of Inquiry* in Docket No. 18397, 15 FCC 2d 417). With the adoption of the proposed rule in July, 1970, the Hill Tower licensees contend that their plans regarding the development of CATV holdings in the Dallas area were effectively terminated. That Hill Tower in its 1967 and 1968 communications with the Mesquite

and Richardson community councils espoused the belief that the grant of any CATV franchise would be premature is not denied. However, the Hill Tower licensees maintain that their position which was reasonable and economically prudent in light of the circumstances set forth above, was a wholly proper expression of views to legislative officials concerning an important issue of policy pending before those councils.[11] Finally, Belo and Times Herald conclude in their oppositions that it was not a lack of good faith on their part, but rather the uncertainties that prevailed throughout the period in question which accounted for their lack of CATV construction in the Dallas area.[12]

16. In its reply to the licensees' oppositions, Civic rejects Carter's explanation of why it did not seek CATV franchises in Dallas County and submits that Carter's own cooperative actions with Belo and Times Herald belie the contention that an inter-county rivalry would preclude Carter from doing business in Dallas County.[13] The Hill Tower licensees' reliance upon this

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11. In addition, Times Herald states that its employee's abstention from voting on the Mesquite CATV proposal was the proper course of action and reflects no misconduct on the part of either the licensee or the individual in question.

12. Although it was not specifically accused of attempting to impede CATV development in the Fort Worth area, Carter has detailed its CATV activities in Tarrant County in its opposition pleading. Again, the uncertainty and subsequent restrictions of the Commission's regulatory policies are cited as the principal reason for the licensee's adoption of a "passive stance" with respect to its local CATV franchise applications. Carter further states that competing CATV franchise applications were filed in most of the Fort Worth area communities in which it had applied and that it did nothing to either discourage or encourage action on any of the applications, including its own, other than to send representatives to the meetings of several city councils which had notified Carter that CATV was to be discussed.

13. Civic also notes that Carter has nowhere explained the reasons for its meetings with Belo; and submits that there were more than two meetings between these licensees regarding their CATV ventures. The supporting documentation for the latter allegation is not included in Civic's reply pleading, rather the notation "Restricted by Court Order" is inserted in its stead. See paragraphs 4 and 10, *supra*.

inter-city or inter-county rivalry is equally specious argues petitioner who notes that other CATV franchise applicants, such as CAS Mfg. Co., which sought franchises in both counties, and Bass Broadcasting Co., a Fort Worth based applicant that applied for franchises in Dallas County, did not similarly restrict their CATV activities. According to Civic, the only factual evidence of the rivalry claimed by the licensees concerned a dispute which occurred over twenty years ago. Civic continues that although it may have been "theoretically" possible for the Hill Tower venture to exist for innocent and legitimate purposes, such was not the case. In this regard, Civic challenges the credibility of the claim that the Commission's restrictions on the importation of distant television signals unexpectedly caused an alteration of Hill Tower's plans for the development of CATV. Civic reports that Hill Tower initially proposed a 12-channel CATV system which would carry the signals of all the television stations serving the metropolitan area and have three channels devoted for education, news and weather. Since there were nine local broadcast signals at that time which Hill Tower would be required to carry on its CATV system, Civic contends that Hill Tower did not have the channel capacity to accommodate any imported television signals and thus was not affected by the Commission's regulations in this regard.[14]

17. It is Civic's opinion that Belo, Times Herald, and Carter have conspired to prevent the entrance of CATV service into the market in order to preserve the conspirators' virtual monopoly

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14. In its comments, which were directed to certain alleged errors in Civic's reply pleading, Times Herald argues that Hill Tower's letter of January 3, 1966 to the Mayor of Irving, Texas and the CATV promotional booklet circulated by Hill Tower clearly show that it was Hill Tower's intention from the first to import distant television signals and that two channels on its proposed CATV system were specifically reserved for that purpose. Notwithstanding the designation of these channels, Civic still maintains that the proposed CATV system would not have had the capacity to carry any distant signals because of the mandatory carriage of the local signals from the five operating VHF stations and from the four UHF stations for which construction permit applications had been granted or were pending at that time.

of the Dallas-Fort Worth television market. However, the fact that meetings took place between representatives of the various licensees and Hill Tower regarding the preliminary development of CATV in the area does not, standing alone, dictate the conclusions advanced by petitioner. Each of the parties herein obviously had an interest in CATV development. For the parties to discuss and pursue that interest, either jointly or individually, was not contrary to our rules. See *Michiana Telecasting Corp.*, 26 FCC 2d 21 (1970). Nor can we discern an unlawful conspiracy from the fact that individual licensees sought to develop CATV holdings in areas where they were already well established or where other parties had not expressed a similar interest. The licensees, through the affidavits of its principals, have denied the existence of any agreement or understanding relating to a division of the Dallas-Fort Worth CATV market and have explained the economic and other business factors which influenced their independent activities. The existence of such a conspiracy is further belied by the refusal of one of the alleged conspirators to identify those communities in which it was expolring the possibility of acquiring or developing CATV systems. That Carter and Belo and Times Herald, acting through Hill Tower, were hesitant to unequivocally commit the substantial monetary and other resources necessary to establish CATV systems in those Tarrant and Dallas County communities where they had earlier explored the feasibility of CATV development is understandable in view of the nascent nature of this communications medium at that time and uncertainties and restrictions of our initial regulatory policies in this field. On the basis of the information before us, it does not appear that Belo, Times Herald, and Carter either individually or in concert, conspired or otherwise improperly acted to preclude or hinder CATV development in the Dallas-Fort Worth area. In this regard, it is siginificant to note that the Court on the basis of *all* the material discovered and all other relevant evidence found and concluded that:

> ...there is insufficient evidence of probative value to establish that THE TIMES HERALD PRINTING COMPANY, T. H. LIQUIDATING COMPANY and A. H. BELO CORPORATION or CARTER PUBLICATIONS,INC., or any of them, have engaged in any actions alleged by plaintiffs' complaint to be in violation of the antitrust laws of the United States, or to have

engaged in unfair competitive practices against Maxwell Electronice Corporation...

OBSTRUCTION OF UHF DEVELOPMENT

18. Petitioner also alleges that Belo, Times Herald, and Carter have conspired to retard the development of UHF television in the Dallas-Fort Worth area by relegating the program listing of the UHF stations to an inferior position in their co-owned newspapers. See note 4, *supra.* Civic maintains the Maxwells and other UHF operators attempted to change this listing policy, even to the extent of offering to buy the newspaper space necessary to provide UHF program listing on an equal format to VHF listings. Petitioner further contends that Belo and Times Herald communicated with each other regarding the newspaper listing of UHF station programs, and that their combined refusal to provide equal listing was motivated by their desire to suppress competition from the UHF stations. Carter is alleged to have participated in the conspiracy by virtue of its agreement with Times Herald to exclude UHF schedules from the Sunday TV booklets from their newspaper. Civic concludes that the motive of the three licensees in providing dissimilar listing in their respective newspapers was clearly to perpetuate their domination of the Dallas-Fort Worth market and to suppress any possible competition.

19. In opposition, the licnesees maintain that the format and content of their respective newspaper television listings were dictated by individual editorial judgments and were not the result of any conspiracy or joint attempt to thwart UHF development in the area. Belo and Times deny that there was any agreement or mutual understanding concerning the content or format of their respective television listings. In the same vein, Carter submits that it had no control over the content or format of Times Herald:s Sunday TV magazine, but merely prints the magazine from the matrices supplied by Times Herald. It is further asserted that the television listings of the *Fort Worth Press,* which does not own a television station in the area, were of similar format and underwent changes similar to those that occurred in their co-owned newspapers. The real reason for the disparity in treatment, argues the licensees, was the shorter

broadcasting day of the fledgling UHF stations. More specifically, the existing VHF stations in the market broadcast approximately 18 hours per day, whereas the UHF stations, at their inception, were only on the air for between 4 and 8 hours per day. To add the UHF stations to the columnar listing format, argue the licensees, would have resulted in considerable dead or open space on the television page. The licensees contend that even if that dead space were paid for, it was wasted in terms of its ability to convey information; and that a situation where the UHFs paid for their listings and the VHFs got them free would be infeasible and anomolous. It is asserted that the television listing decisions were not motivated by competitive pressures from the UHF stations since the newspapers regularly listed the programming of Dallas' VHF independent station, a far more powerful competitor, in the same manner as their commonly-owned network affiliated VHF stations. The licensees further assert that in 1969 when it became feasible to do so, the newspapers independently changed their listing format to include UHF stations on an equal basis.[15]

20. In its reply, Civic renews the arguments it previously advanced which assertedly had not been refuted by the licensees. In petitioner's view, the licensees have not estab..shed that they did not conspire with respect to the listing of the UHF program schedules in their newspapers. According to Civic, the actions of the *Fort Worth Press* do not demonstrate the impartiality of the UHF listings in the licensees' co-owned newspapers, because the Press is owned by Scripps-Howard which in turn, owns VHF television stations. Petitioner further argues that the licensees have not adequately explained their refusal to sell listing space to the UHF stations. Petitioner discounts the licensees' argument based on the length of the UHF's broadcast day

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15. The licensees further assert that they have affirmatively acted to assist the UHF stations in the area. At various times, all three co-owned newspapers published stories about the UHF stations as well as multi-page supplements on UHF. Carter also asserts that it provided KFWT (Channel 21) with a tower, a new road to the tower, technical assistance and forwent rent while the station experienced financial difficulties. Belo and Times Herald also assert that Hill Tower personnel provided technical assistance to KMEC-TV.

by alleging that Channels 33 and 39 commenced broadcasting a 12 to 15 hour day within a short time of their inception. Their listings would therefore involve little dead space. But, argues Civic, even if the UHFs had a considerably shorter day, they were willing to pay for the wasted space. Petitioner further asserts that the material assistance allegedly given the UHF stations by the licensees was of little or no value and that the newspaper stories and supplements on UHF provided little solace since UHF programs received a less than proportional share of recommendations in the television columns and the supplements were predominately advertising.

21. With respect to Civic's allegation that Belo, Times Herald and Carter have conspired in a deliberate effort to eliminate the UHF stations as potential competitors to the conspirator's own newspaper and broadcast operations, it is noted that the newspapers of the applicants each treated television listings in a different manner and changed their various formats at different times. It is also noted that the independent VHF station, presumably a bigger competitor, was listed with the three network affiliated stations owned by the applicants. It would appear that while the listing of UHF stations separately from the VHF stations was perhaps not the most prudent approach, there is no substantial evidence that the applicants were "conspiring" to eliminate UHF competition. The various decisions of the applicants concerning listings of television programs appear to have been good faith judgments made on the basis of hours of operation, editorial judgment regarding less open or "dead" space on the page, and limited amount of UHF programming. It is also noted that the other daily Fort Worth newspaper, which owns no television station in the market, also, at times, varied its format and treated the UHF stations in a manner similar to the applicants. Regarding Maxwell's offer to purchase space in the listings column which was refused by two of the newspapers, it appears reasonable that such an offer might be denied because of the infeasibility of charging some newspapers for listings, but not others. The copy of the contract between Times Herald and Carter for the printing of the Sunday television supplement indicated that Carter merely does the printing and that Times Herald prepares its own matrices. Thus, there appears to be no substantial

evidence that the actions of the newspapers owned by the applicants were parallel in attempting to eliminate UHF stations. It is noted that all of the papers no longer accord different treatment to UHF stations in their television program listings.

CONCEALMENT OF CATV ACTIVITIES

22. In support of its contention that Belo had concealed from the Commission information which the licensee believed would have had a decisional effect on its outstanding application for transfer of control of Station KFDM-TV, petitioner refers to an August, 1969 memorandum of Mr. Shapiro. In his memo, Mr. Shapiro apprised Belo's executive vice president that the uncertainty of the Commission's CATV regulations and the lack of favorable economic expectations had caused a curtailment of Hill Tower's CATV activities in the City of Dallas. Mr. Shapiro also stated therein that "with the cooperation of KRLD, we remained very silent on the issue as we certainly didn't want our interest in Dallas CATV to get to Washington while they were considering our Beaumont application." Since Times Herald was a party to Belo's CATV activities, Civic maintains that licensee obviously participated in the concealment.

23. In response to Civic's allegations, Belo states that it never had an ownership interest, either directly or indirectly, in any CATV system or in any CATV franchise. It states that months prior to the time it commenced the negotiations leading to its purchase of KFDM-TV, the activities of Hill Tower in connection with obtaining a CATV franchise for Dallas and for other communities in the area had come to, and have since remained at, a virtual standstill. Thus, there was no ownership interest or any CATV activity to conceal from the Commission. Moreover, the statement in question was not factual, submits Belo. Rather, it was a tongue-in-cheek reference to a facetious remark made by Hill Tower's former president during a luncheon conversation with Mr. Shapiro, which occurred after the KFDM-FM application had been granted. In an affidavit, dated September 9, 1971, Mr. Shapiro confirms the explanation proffered by

Belo.[16]

24. The application for transfer of control of Station KFDM-TV was tendered with the Commission on January 27, 1969. And, in Exhibit 4 thereof, Belo indicated that it owned 50% of Hill Tower, Inc., "Owner of land and TV antenna tower used by Stations WFAA-TV, KRLD-TV, and WBAP-TV." By *Memorandum Opinion and Order*, FCC 69-494, released May 9, 1969, the Commission approved the requested transfer of control. The application, therefore, was submitted after the Commission had proposed its prescription on ownership of CATV systems by co-located television licensees and at a time when Hill Tower's CATV activities were at a standstill due to this and other considerations. Moreover, Hill Tower's CATV involvement in the Dallas area, which was widely-known and well-publicized, had not matured to the point where it had acquired an ownership interest either in an operating CATV system or in an outstanding CATV franchise. Accordingly, Hill Tower was under no obligation to report its preliminary and exploratory CATV efforts. See *Lamar Life Broadcasting Co.*, 27 FCC 2d 224 (1971). While we agree with Civic that notwithstanding the explanation advanced by the licensee, the meaning and connotation of the sentence in question is not readily apparent, we cannot perceive therefrom a deliberate attempt by Belo to withhold information from the Commission. Nor is it reasonable to conclude on the basis of this one cryptic sentence that Belo intended to mislead the Commission.

25. It is the judgment of the Commission, based upon its review of the instant petition to deny and *all* of the pleadings relating thereto, that Civic has not raised substantial and material questions of fact which establish a *prima facie* case for denial of the aforenoted license renewal applications. For the most part, the inferences drawn by Civic from the facts alleged have been adequately dispelled by the licensees' submissions. In

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16. Times Herald meanwhile directs the Commission's attention to the absence of a factual showing that it participated in any purported concealment effort. The manner in which Times Herald assisted Belo, in the claimed concealment is not set forth and, therefore, further Commission consideration of Times Herald's alleged involvement in the purported conspiracy is not warranted.

short petitioner had failed to set forth in its petition to deny factual allegations sufficient to show either an abridgment of the antitrust laws or a violation of Commission rule or policy.

26. Two further matters remain for our consideration. Approximately two months after filing its petition to deny, Civic requested the Commission to waive Rule 1.516(e)(1) and permit it to file, within sixty days, an application that would be mutually exclusive with one or more of the pending renewal applications of the licensees against which the formal protest had been directed. On October 30, 1972 Civic renewed its request and expressed the intention to tender applications which would be mutually exclusive with Belo's applications for renewal of license for Stations WFAA and WFAA-FM. We have closely examined the request, as supplemented, and find that grounds sufficient for waiver of Rule 1.516(e)(1) have not been set forth. The WFAA and WFAA-FM license renewal applications were timely filed and the required local notice of their filing was published and broadcast in April, 1971. The fact that final Commission action on these applications was delayed pending our consideration of the aforenoted petition to deny is no justification for the requested action.

27. The remaining matter concerns an alleged violation of the Commission's *ex parte* rules. Civic, by letter of October 27, 1972, informed the Commission that three weeks earlier Commissioner Benjamin J. Hooks had appeared as a guest on the WFAA-TV program "Let Me Speak to the Manager" and was interviewed by the aforenoted general manager of that station. In the course of the interview, which primarily dealt with such subjects as religious and children's programming, equal employment opportunity, entertainment programming, Mr. Shapiro prefaced one of the questions addressed to the Commissioner with the information that area broadcasters had met with a local minority coalition and had reached an agreement concerning minority employment. According to Civic, Mr. Shapiro voiced the licensee's opinion of the agreement which was favorable to Belo and the other licensees involved in this restricted proceeding. Civic asserts that the merits of the agreement with minority groups would be a matter of dispute in the proceedings flowing from its petition to deny and the filing of a competing application for the facilities of

Station WFAA-TV[17] and that Mr. Shapiro's statement therefore contravened the Commission's *ex parte* rules. It is also alleged that further improper presentations were probably made to Commissioner Hooks before and after the taping of the program. Belo denied the *ex parte* accusations and supplied a transcript of the program which allegedly demonstrates that nothing said by Mr. Shapiro during the program could reasonably be construed as a prohibited presentation within the meaning of the Commission's *ex parte* rules. Also submitted by the licensee was an affidavit, dated November 17, 1972, from Mr. Shapiro who avers therein that " [a] t no time prior to, during, or after, the taping of said program did I talk or attempt to talk to Commissioner Hooks concerning the merits of any application or action pending before the Federal Communications Commission, to which A. H. Belo Corporation, or any other Dallas-Fort Worth licensee is a party." In reply, Civic renewed its accusations, and contended that a specific prohibited presentation had occurred when Mr. Shapiro characterized the agreement as "a meaningful arrangement."

28. Initially, it should be pointed out that the Commission's regulations governing *ex parte* contacts which are set forth in Sections 1.1201 to 1.1251 of our rules, do not proscribe all communications made to decision-making personnel outside the presence of other parties to a restricted proceeding. The rules relating to oral contacts forbid *ex parte* presentations--a term that is narrower in meaning than the term communications[18] --only insofar as these presentations relate to "the merits or outcome of any aspect of a restricted proceeding." See Sections 1.1201(f) and 1.1223 of the Commission's rules. Moreover, in adopting its *ex parte* regulations, the Commission specifically disclaimed any intention to discourage contacts between the agency and the industry it regulates on general topics of

17. Earlier, Wadeco, Inc. had filed an application that is mutually exclusive with the Belo application for renewal of license for Station WFAA-TV. That application was designated for hearing with the WFAA-TV renewal application on May 24, 1973. See *A. H. Belo Corporation (WFAA-TV)*, 40 FCC 2d 1131 (1973).

18. For a discussion of the meaning of the term presentation, see paragraphs 19-25 of the *Report and Order* in Docket No. 15381, 1 FCC 2d 49 (1965).

mutual concern.[19] Minority employment, religious and children's programming, and general entertainment programming are significant topics of legitimate concern to broadcasters. Mr. Shapiro's comments during the interview appear to have been directed to eliciting an expression of Commissioner Hooks' attitude toward those topics. It is the Commission opinion that his commentary did not "go to the merits" of Belo's license renewal application. Indeed, the only specific remark complained of appears to us to have been taken out of context.[20] However, even if we were to assume that this passing remark was impermissible, the prohibited presentation was broadcast via the WFAA-TV facilities for all to see. Accordingly, the principal evil of *ex parte* commun-

19. "[T]here are many problems of a general nature which are of mutual interest to the Commission and the industry. There is a need for communication between the Commission and the industry concerning these problems--on an informal as well as formal level. There may be a need for informal communication between the Commission and parties to a restricted proceeding concerning these problems. And this may be so, even if the problems are in some way related to the restricted proceeding in which they are participating. The rules should not be construed as an absolute bar to such communications, although they do bar *ex parte* communications dealing directly with the merits of the restricted proceeding." *Report and Order supra*, 1 FCC 2d at 57. See also *Multi Vision Northwest, Inc.*, 8 FCC 2d 1151, 1156 (1967).

20. Civic's interpretation of the statement, gratuitously proffered by Shapiro, as referring to the agreement reached with the local minority coalition is somewhat strained. The question posed to Commissioner Hooks, including the remark specifically complained of, was as follows:

> Commissioner, in the Dallas-Fort Worth market, we have an organization called the Coalition for the Free Flow of Information Committee. At the time that all of the broadcast stations were up for license renewal a little over a year ago, we sat down with this group. There may be more in the group now, but they said they represented about seventeen different minority organizations and all of the stations worked out we think an agreement, it was probably long overdue, there were some injustices, there were some shortages on the part of broadcasters. We think that it is a meaningful arrangement to have these people who can work with us to point out these inequities, but we constantly get into a black versus another type of minority situation. Now you have a tremendous responsibility I would assume as the first black on the regulatory agencies. How do you approach the job? You're approaching it for all minorities, are you not?

ications--the surreptitious or clandestine presentation of one's case to the decision-making official--is not present here. Nor can we perceive an attempt to prejudice the Commissioner's attitude with respect to the licensee by the mere description of the agreement as "meaningful." Under these circumstances, the Commission does not believe that the imposition of sanctions if warranted. See *Quest for Life, Inc.*, 10 FCC 2d 220 (1967). With respect to Mr. Shapiro's conversations with Commissioner Hooks before and after the taping session, petitioner offers no factual support for its suspicion of impropriety. Such a belief, predicated on nothing more than the opportunity for impropriety, does not justify a finding that unauthorized presentation occurred, especially where, as here, that unsubstantiated opinion is refuted by the sworn statements of the party in question. See *Petersburg Television Inc.*, 30 FCC 109, 112-13 (1961). Again, we believe that further Commission action with respect to this matter is not appropriate.

29. In view of the foregoing and our review of the license renewal applications for Stations WFAA and WFAA-FM, Dallas, Texas, Station KDFW-TV, Dallas, Texas, and Stations WBAP, WBAP-FM, WBAP-TV, Fort Worth, Texas, we conclude that the licensees of these stations are legally, technically, financially and otherwise qualified to remain Commission licensees and that a grant of their respective license renewal applications would serve the public interest, convenience and necessity.[21]

30. Accordingly, IT IS ORDERED, That the Motion for leave to file, and Comments tendered therewith, filed December 21, 1971, by Times Herald Printing Co., IS GRANTED, and the aforenoted pleading and the pleading in response thereto, filed January 7, 1972, by Civic Telecasting Corporation, ARE ACCEPTED.

31. IT IS FURTHER ORDERED That the Motion requesting modification of Order of May 23, 1973, as supplemented, filed

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21. The application for renewal of licensee of WFAA-TV cannot be resolved at this time due to the comparative hearing involving Wadeco, Inc. See note 17, *supra*.

June 5, 1973, by A. H. Belo Corporation, IS DISMISSED AS MOOT.

32. IT IS FURTHER ORDERED, That the Petition for waiver, as supplemented, filed August 31, 1971, by Civic Telecasting Corporation, IS DENIED.

33. IT IS FURTHER ORDERED, That the Petition to deny, filed July 1, 1971, by Civic Telecasting Corporation, IS DENIED.

34. IT IS FURTHER ORDERED, That the above-captioned applications for renewal of license for Stations WFAA and WFAA-FM Dallas, Texas, Station KFDM-TV, Beaumont, Texas, Station KDFW-TV, Dallas, Texas, and Stations WBAP, WBAP-FM, and WBAP-TV, Fort Worth, Texas, ARE GRANTED for the remainder of their regular license term, *i.e.*,until August 1, 1974.

FEDERAL COMMUNICATIONS COMMISSION,*
VINCENT J. MULLINS, *Secretary*.

In re Applications of the A. H. Belo Corporation, WFAA-AM-FM-TV, Dallas, Texas, et al.

CONCURRING STATEMENT OF CHAIRMAN RICHARD E.WILEY

While I concur in the Commission opinion in this matter, I feel that it is appropriate to emphasize my view that it is not prudent for VHF licensees in relegate the program listing of their UHF competitors to an inferior position in their co-owned newspapers. I trust that VHF-newspaper combinations will be cognizant of the public interest in developing VHF and UHF as a single television service and will avoid even the appearance of impropriety in these matters.

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* See attached Statement of Chairman Wiley.

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of
CARTER PUBLICATIONS, INC., ASSIGNOR
and
CAPITAL CITIES COMMUNICATIONS, INC., ASSIGNEE,
File No.: BAPL-432; BAPLH-157
For Assignment of Licenses of Stations WBAP-AM and KSCS-FM, Fort Worth, Tex.
and
CARTER PUBLICATIONS, INC., ASSIGNOR
and
NORTH TEXAS BROADCASTING CORP., ASSIGNEE,
File No.: BALCT-510
For Assignment of License of Station WBAP-TV, Fort Worth, Tex.

MEMORANDUM OPINION AND ORDER

(Adopted May 13, 1974; Released May 16, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN, AND HOOKS CONCURRING IN THE RESULT; COMMISSIONER QUELLO NOT PARTICIPATING.

1. We have before us for consideration: (a) an application for voluntary assignment of the Licenses of Stations WBAP-AM and KSCS-FM, Fort Worth, Texas from Carter Publications, Inc. to Capital Cities Communications, Inc.; (b) an application for voluntary assignment of the license of Station WBAP-TV, Fort Worth, Texas from Carter Publications, Inc. to North Texas Broadcasting Corporation; (c) Petitions to Deny the applications filed by Civic Telecasting Corporation; (d) Oppositions to the Petitions to Deny filed by Carter Publications, Inc., Capital Cities Communications, Inc. and North Texas Broadcasting Corporation; (e) Comments and Objections filed by Radiofone Corporation of New Jersey, Inc.; (f) a letter of response filed by North Texas Broadcasting Corporation; and (g) a letter commenting on the response, filed by Radiofone Corporation of New Jersey, Inc.

2. The application for assignment of the licenses of Stations WBAP-AM and KSCS-FM was accepted for filing on April 12, 1973. The Petition to Deny was timely filed on May 14, 1973. The application for assignment of the license of Station WBAP-TV was accepted for filing on March 27, 1973 and therefore any Petition to Deny the application must have been filed by April 26, 1973. The Petition to Deny was not filed until May 14, 1973 and therefore is untimely under our Rules. However, as indicated below, the matters raised in this Petition will be fully considered on the merits as an informal objection, under Section 1.587 of the Commission's Rules.

3. Petitioner's claim to standing under Section 309(d) of the Communications Act and Section 1.580 of our Rules is based upon the following statement:

> Civic Telecasting Corporation is owned by James T. Maxwell and Carroll H. Maxwell, Jr. (The Maxwells), who are also long-time residents of the Dallas-Fort Worth area, having resided in Dallas County for over 30 years. The Maxwells have been regular viewers of WBAP-TV since, and including its very first day of broadcasting in 1948; no other person has been a viewer of WBAP-TV for any longer period of time. The Maxwells were also officers, directors,and stockholders of Maxwell Electronics Corporation, which operated UHF television station KMEC-TV, Channel 33, in Dallas in 1967 and 1968. The Maxwells were in charge of the construction and management of KMEC-TV, which attempted to compete with the other television stations in the market, including WBAP-TV. As both viewers and competitors, the Maxwells are familiar with the past operation and practices of Carter. Therefore, CTC is uniquely qualified to bring before the Commission matters bearing upon the public interest in connection with Carter's applications for assignment of WBAP, KSCS-FM, and WBAP-TV, and is therefore a qualified party in interest with standing to file a petition to deny.

The applicants, in their separate Oppositions to Petition to Deny, dispute Petitioner's claim to standing, pointing out that Civic Telecasting Corporation makes no claim to standing

with respect to the assignment application for Stations WBAP and KSCS (FM) and that with regard to the WBAP-TV application, its claim to standing is grounded solely on the alleged status of its principals, the Maxwells, "as both viewers and competitors of Station WBAP-TV." The Petitioner, Civic Telecasting Corporation, is not a licensee, has no interest in any broadcast station in the Fort Worth-Dallas market and is not an applicant for a broadcast license in the market.

4. Without deciding the question of standing, we have carefully considered the matters raised in the Petition on their merits. This approach is consistent with our actions in other cases where even a holding adverse to the Petitioner on the threshold question of standing has not foreclosed our examination of the merits of the Petition, e.g. *Clay Broadcasters, Inc.*, 21 RR 2d 443 (1971).

5. The major portion of the Petitions to Deny the Assignment applications consists of restatements of the Petitioner's allegations of anti-trust activities, and misrepresentation (Section 1.65 issues) arising therefrom, on the part of Carter Publications, Inc. It is alleged that Carter conspried with two Dallas broadcast station and newspaper owners to monopolize the Dallas-Fort Worth market and that Carter has failed to disclose all facts regarding its involvement in the anti-trust suit. These matters were first raised in Petitions to Deny the stations' renewal applications in 1971 and are fully disposed of in the companion Memorandum Opinion and Order issued this date, which grants the renewal applications for the three stations. Thus, these matters will not be treated here.

6. The only other questions raised by Petitioner are Capital Cities Communication, Inc.'s status as a multiple owner of broadcast facilities and print media, and an allegation that LIN Broadcasting Corporation (100% owner of North Texas Broadcasting Corporation) is not financially qualified to purchase and operate Station WBAP-TV. The Commission carefully considers these matters in its evaluation of every application for assignment of license or transfer of control and we have done so in this instance.

7. The Petitioner states: "In the process of removing the television station from newspaper ownership, Capital Cities

reaches its limit as a group broadcaster, save for one FM and one UHF television station. AT the same time, although it is already in the newspaper business, Capital Cities would increase its newspaper interests manyfold. Not only would it be acquiring a newspaper in Fort Worth, it would be acquiring the entire Fort Worth newspaper market." Capital Cities is presently the licensee of six AM stations, five FMs, five VHF TVx and one UHF TV. However, they are scattered throughout the continental United States. Its only broadcast interest in Texas is KTRK-TV, Houston, which is 250 miles from Fort Worth. Capital Cities was found by the Commission to be fully qualified as a licensee at the time it acquired WPVI-TV (formerly WFIL-TV), Philadelphia, Pennsylvania on February 24, 1971. The instant acquisition represents its first purchase or sale of a broadcast interest since that time. The Commission concludes that the addition of WBAP and KSCS (FM) to its holdings would not result in a concentration of control of broadcast licenses contrary to the public interest.

With respect to its newspaper holdings, Capital Cities controls daily afternoon newspapers in Belleville, Illinois with a circulation of approximately 30,000. and Pontiac, Michigan, with a circulation of approximately 78,000. Acquisition of the Carter stock would give Capital Cities control of the *Fort Worth Star-Telegram*, published mornings, evenings, and Sundays, with circulations of 94,000, 141,000 and 227,000, respectively. The other newspaper of general circulation published in Fort Worth is the *Fort Worth Press*, published daily, except Saturday, with a circulation of 44,000 daily and 49,000 Sunday. However, the two major Dallas papers, the *News* and *Times Herald*, and the *Wall Street Journal* (Southwest edition, published in Dallas) have very significant circulation in Fort Worth.

In *Times Herald Printing Co.*, 25 FCC 2d 984 (1970), the Commission examined closely the status of competition and concentration in mass media in the Dallas-Fort Worth market. The Commission concluded that "the Dallas-Fort Worth area is served by a plethora of media, and it would be virtually impossible to unduly influence the American people by common ownership of the Dallas Times Herald and KRLD-TV, in the context of current ownerships in Dallas-Fort Worth." The Commission's broad

proposal to prohibit the sale of any existing newspaper-broadcast combinations in the same market to a single party (Docket 18110) would proscribe a sale such as that proposed in the instant application. However, the Commission did not establish an interim policy with respect to newspaper-broadcast applications filed during the pendency of the proceeding. Thus, a number of applications involving newspaper and broadcasting properites in the same market have been granted by the Commission where the applicant has shown that there would be no undue concentration of control of mass media (e.g. *United Broadcasting, Inc.*, 23 RR 2d 1182 (1970); *Manhattan Broadcasting Co., Inc.*, 23 RR 2d 1181 (1972)). The Commission is of the view that the separation of the television and newspaper properties now held by Carter will result in a reduction of concentration of control of mass media in the Dallas-Fort area and that the acquisition of the WBAP and KSCS radio stations and newspaper by Capital Cities will not result in an undue concentration of control of mass media contrary to the public interest.

8. With respect to the assignment of Station WBAP-TV to North Texas Broadcasting Corporation, the Petitioner states that an examination of the LIN Broadcasting Corporation financial plan and its pro-forma balance sheet reveals that the purchase itself will immediately render LIN insolvent (The parent LIN is committed to assume North Texas' financial obligations). According to the Petitioner, this is so because LIN's current liabilities will, after the acquisition, exceed its current assets (LIN's pro forma balance sheet shows current liabilities exceeding current assets by approximately $1,000,000) and because "with a total market value of less than $20 million...LIN proposes to pay almost twice that much for another station without investing any capital of its own." The Petitioner also alleges that LIN's $35 million credit agreement with three New York banks will require interest payments so substantial that, by the fifth year following acquisition, the cost of servicing LIN's debt will doom LIN to

bankruptcy.[1]

9. LIN's anticipated negative current asset/current liability ratio is relevant only in that it is one of the factors to be considered in its ability to repay its obligations and to meet the Commission's test, set forth in *Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965)–that is,whether North Texas has shown fully the composition of all obligations it will incur during the first year of operation and has demonstrated its ability to meet them. LIN has shown that it has adequate liquid resources to meet its first year needs as follows: it will have approximately $23,800,000 available from its escrow deposit, bank loans after deducting first year repayments, cash on hand and cash flow from its various subsidiaries. Its first year needs total approvimately $21,900,000. This figure includes a $17,500,000 payment to the seller at closing, $1,200,000 in capital asset improvements, note payments unrelated to the WBAP-TV transaction, interest and letter of credit fees on the notes to the seller, accrued liabilities on past litigation and LIN's portion of the grant fee. LIN also has demonstrated that there are no large "balloon" payments coming due in the second year, and has provided for stable retirement of the company's obligations for the next several years. Its $20,000,000 loan from three New York banks will be amortized over eight years in quarterly installments and will bear interest @ 1½% above the prime rate. Repayments will commence at the end of the third quarter following closing and will consist of ten installments of $375,000, four installments of $562,500 and sixteen installments of $875,000 plus interest. ($2,500,000 of the $20,000,000 loan will remain on deposit as collateral.) Principal on the $17,500,000 in 6% promissory notes to the Carter shareholders will be paid during the seventh through

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1. It is noted that the Petitioner's objection is against the North Texas financial proposal submitted with the original application. North Texas has since, by amendment, submitted a revised financial plan. The original plan provided for back loans of $35,000,000 and a payment of $35,000,000 to the seller at closing, while the revised plan provides for bank loans of $20,000,000 and a payment of $17,500,000 at closing.

tenth years after the closing. Interest only will be paid in the first through sixth years. We have carefully applied the *Ultravision* test to the North Texas revised plan of finance and find that it fully meets the test. The parent LIN has shown that its first year sources of funds will exceed its first year needs by some $2,000,000 and it has provided for stable retirement of the company's obligations for the next several years.

10. Finally, we must consider a pleading entitled "Comments and Objections of Radiofone Corporation of New Jersey, Inc.," a letter of North Texas Broadcasting Corporation responding to that pleading and a letter of Radiofone commenting on the North Texas response. Radiofone states that it is the licensee of several stations in New Jersey operating in the Domestic Public Land Mobile Radio Service and that each operates on a separate UHF frequency and provides two-way mobile service on a primary basis and one-way paging service on a secondary basis. Radiofone further states that it has filed with the Commission applications seeking authority for an additional Transmitter location for each of these stations in New York City and that a Petition to Deny the applications has been filed by Page Boy, Inc., a wholly owned subsidiary of LIN Broadcasting Corporation, and the licensee of a low-band, one-way paging station in the Domestic Public Land Mobile Radio Service in New York City.

11. Radiofone avers that central to Page Boy's Petition is a claim that establishment of Radiofone's proposed facilities in New York City will result in direct, tangible and adverse economic impact on Page Boy. Radiofone further states that Page Boy is able to draw on LIN's financial resources and concludes that either LIN is not as financially sound as it depicts itself, as Radiofone has no reason to doubt other than Page Boy's contentions, or Page Boy's economic injury arguments are totally without merit; and Radiofone believes the latter to be the case.

12. North Texas replies that Page Boy is not asserting any inability to continue operations, any inability to serve the public or any financial weakness on its own part or on the part of LIN, but is simply avering the obvious fact that the addition

of a new competitor would adversely affect it. North Texas states that the Radiofone assertions have no relevance to the instant proceeding, and we agree. It has made no allegation that North Texas is not legally, technically, financially or otherwise qualified to acquire Station WBAP-TV or that the public interest would not be served by a grant of this application. Indeed, it has stated that it has no reason to doubt LIN's sound financial posture and it believes the Page Boy assertions of economic harm to be fabrications.

13. We have carefully examined the Petition to Deny, informal objections and papers before us and find that there are no substantial and material questions of fact that remain unresolved. We find that the assignees are fully qualified and that grants of the applications will serve the public interest, convenience and necessity. Accordingly, the Petition to Deny, filed by Civic Telecasting Corporation is DENIED, and the informal objections filed by Civic Telecasting Corporation and Radiofone Corporation of New Jersey, Inc., are DENIED; and the application for assignment of the licenses of Station WBAP-AM and KSCS-FM, Fort Worth, Texas, from Carter Publications, Inc. to Capital Cities Communications, Inc., IS GRANTED;[2] the application for assignment of the license of Station WBAP-TV, Fort Worth, Texas, from Carter Publications, Inc. to North Texas Broadcasting Corporation, IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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2. These applications are granted subject to the conditions specified in letters we have this day directed to North Texas Broadcasting Corporation and to Capital Cities Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of
THE A. H. BELO CORP., WFAA-AM-FM-TV, Dallas, Tex., Files Nos. BR-395, BRH-1192, BRCT-33

BEAUMONT TELEVISION CORP., KFDM-TV, Beaumont, Tex., File No. BRCT-556

THE TIMES HERALD PRINTING CO., KDFW-TV, Dallas, Tex., File No. BRCT-85

CARTER PUBLICATIONS, INC., WBAP-AM-FM-TX, Fort Worth, Tex., Files Nos. BR-404, BRH-539, BRCT-27

For Renewal of Broadcast Licenses

MEMORANDUM OPINION AND ORDER

(Adopted September 11, 1974; Released September 16, 1974)

BY THE COMMISSION:

1. The Commission has before it a petition, ciled June 17, 1974, by Civic Telecasting Corporation requesting reconsideration of the *Memorandum Opinion and Order*, FCC 74-489, released May 16, 1974, granting the above-captioned applications for renewal of license and denying a petition to deny those applications filed by Civic. Petitioner alleges that our Order therein was based on incomplete information and requests that it be set aside insofar as it relates to the grant of the renewal applications of Carter Publications, Inc. Civic also requests an opportunity to present additional information for the Commission's consideration.

2. Initially, it will be helpful to briefly restate the history of this proceeding insofar as it relates to the basic premise of the

petition for reconsideration.[1] On September 9, 1970, Civic's principals, acting through UHF, Inc., instituted a civil antitrust suit in the United States District Court for the Northern District of Texas, Dallas Division, (Civil Action No. 3-4156-A), charging, among others, Belo and Times Herald with violations of the Sherman Anti-Trust Act.[2] Thereafter, Civic filed its petition to deny the above-captioned renewal applications raising essentially the same matters alleged in the civil suit. At the request of Belo and Times Herald, the U.S. District Court issued a Protective Order limiting the use of the civil suit discovery to that proceeding. Requesting an extension of time within which to file its reply pleading to the Commission, Civic argued that the Court's Protective Order restricted the material that could be used in that pleading. The Broadcast Bureau ordered Civic to file its reply, and, accordingly, Civic tendered for filing its responsive pleading. However, portions of the reply pleading which allegedly referred to material subject to the Protective Order were deleted and the notation, "Restricted by Court Order," inserted in their place. Subsequently, on appeal of the Bureau's action, the Commission granted petitioner additional time within which to perfect its pleading (40 FCC 2d 1136).

3. Following our action therein, Belo requested the Texas Court to modify the Protective Order to permit Civic's disclosure of material earlier disclosed or used by the applicants in their opposition pleadings.[3] On June 11, 1973, the Court modified the Protective Order to permit the submission of discovered material to this Commission if that information was previously disclosed or discovered before September 30, 1971 (the filing date of Civic's petition to deny). The Court further noted that the only restriction of the remaining discovered material was limited to information found to be confidential. On July 5, 1973, at the

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1. A more complete recitation of this history may be found in our *Memorandum Opinion and Order*, FCC 74-489, at paragraphs 3 through 10.

2. Carter was not made a defendant in the civil antitrust case; however, it was named as a co-conspirator.

3. Civic, Carter and Times Herald simultaneously requested the removal of all restrictions on use of discovered material.

request of Carter, the Court removed all restrictions on matter discovered from that party. Thereafter, On December 21, 1973, the Commission was informed that the parties had reached an agreement in settlement of the civil antitrust suit, and in accepting that agreement, the Court, at the request of Times Herald, removed all restrictions on matter discovered from that party. Belo did not similarly request a lifting of the Protective Order, but indicated a willingness to submit all material to the Commission under circumstances which would protect the confidential matter contained therein. Under these circumstances, on February 13, 1974, the Chief of the Broadcast Bureau afforded Civic fifteen days to perfect its reply pleading. Civic responded that only the restrictions as to Carter and Times Herald had been removed since Belo did not have the authority to unilaterally modify the Court's Protective Order. Considering these matters however, the Bureau concluded and informed Civic that its ability to perfect its reply was not unduly hindered by the Court.[4] Nonetheless, Civic opted not to perfect its reply.

4. Accordingly, in FCC 74-489, we found that all judicial restrictions on the use of material discovered from Times Herald and Carter had been removed and that there was no impediment to the perfection of petitioner's reply as to those licensees. With regard to Belo we found that while some judicial restrictions remained, Civic had failed to identify the protected material on which it relied to support its allegations. We, therefore, concluded that Civic's continued refusal to perfect its reply pleading was unreasonable, that any further delay in the resolution of the matters raised by Civic's petition to deny would be contrary to the public interest, and that the matter should therefore be determined on the basis of the facts then before the Commission. It is from these determinations that Civic herein requests redress.

5. Civic's requested reconsideration is based on the proposition that all significant restrictions regarding information on Carter

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4. With regard to the limitations on the material discovered from Belo, the Bureau suggested that if Civic believed material to be protected, it should identify the restricted material and the relevant Court order.

and Times Herald have not been removed. Civic contends that while it could submit information discovered from those licensees, it could not submit all the information about those licensees due to the restrictions which remained concerning information discovered from Belo. Petitioner alleges that by letter of May 23, 1974, it sought the concurrence of the Texas Court in the procedures suggested by Belo in December, 1973, the submission of information to the Commission under a confidentiality restriction. According to Civic, the Court has not responded to its letter, but Belo indicated that its December offer did not apply to the submission of information for use in a petition for reconsideration. Petitioner, therefore argues that the Commission's decision (FCC 74-489) was not based on a full and complete disclosure of the facts.

6. We cannot agree with this contention. As set forth in our Order, (FCC 74-489), Civic has had ample opportunity to supply the Commission with facts to support its various allegations. Civic could have supplied information discovered from Times Herald and Carter. Also, Civic could have identified the confidential information upon which it wished to rely to support its arguments regarding Belo.[5] Rather, Civic opted to await our Order before attempting to submit information which it believed had a bearing on the Commission's decision. As the Court held in *Colorado Radio Corp.* v. *F.C.C.*, 118 F. 2d 24,26 (D.C. Cir. 1941) "We cannot allow appellant to sit back and hope that a decision will be in its favor, and, then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such procedure were allowed."

7. We, therefore, find that Civic has failed to offer any new facts to support its contention that its ability to perfect its reply pleading was unduly hampered by the actions of the Texas Court. We need not, of course, consider again matters which have already

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5. Civic could also have sought Court clarification of the scope of the Protective Orders in December, 1973, when Belo made its offer. However, petitioner inexplicably delayed this action and then sought clarification by the most informal means to which the Court has not responded.

been pre sented, considered and disposed of. *The Spartan Broadcasting Co.*, 22 FCC 2d 920 (1970). Nevertheless, we have reviewed our *Memorandum Opinion and Order,* FCC 74-489, in the light of Civic's petition for reconsideration, to determine whether we erred in reaching our determinations therein. Based on that review, we find no reason to disaffirm our earlier decision and, thus, Civic's petition will be denied.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration filed herein by Civic Telecasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
Vincent J. Mullins, *Secretary.*

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of
CARTER PUBLICATION, INC. (ASSIGNOR)
AND
CAPITAL CITIES COMMUNICATIONS, INC. (ASSIGNEE),
Files Nos. BAPL-432, BAPLH-157, BASCA-565

For Assignment of Licenses of Stations
WBAP-AM and KSCS-FM, Fort
Worth, Tex.
AND
CARTER PUBLICATIONS, INC. (ASSIGNOR)
AND
NORTH TEXAS BROADCASTING CORP. (ASSIGNEE),
File No. BALCT-510

For Assignment of License of Station
WBAP-TV, Fort Worth, Tex.

MEMORANDUM OPINION AND ORDER

(Adopted September 11, 1974; Released September 16, 1974)

BY THE COMMISSION:

1. The Commission has before it a petition, filed June 17, 1974, by Civic Telecasting Corporation requesting reconsideration of the *Memorandum Opinion and Order,* FCC 74-490, adopted May 13, 1974, released May 16, 1974, granting the above captioned applications for assignment of licenses and denying a petition to deny those applications filed by Civic. The petition asserts that Civic has not been afforded an ample opportunity to perfect its reply pleading and requests that the grant of the above-captioned applications be set aside to permit the filing of that pleading.

2. The procedural situation whereby Civic believes that it has been unable to perfect its reply pleading has been fully set forth in our *Memorandum Opinion and Order* FCC 74-489, dealing with Civic's petition to deny the renewal applications filed by A. H. Belo Corporation, Beaumont Television Corporation, the Times Herald Printing Co., and Carter Publications, Inc. Briefly,

in 1970 Civic's principals, acting through UHF, Inc., filed a civil antitrust suit against Belo and Times Herald in which Carter was joined as a co-conspirator. Thereafter, Civic filed a petition to deny the various Belo, Times Herald and Carter license renewal applications alleging the same matters as raised in the civil antitrust suit. On essentially the same grounds, Civic petitioned to deny Carter's assignment applications for Stations WBAP, KSCS-FM and WBAP-TV, Fort Worth, Texas.

3. Pursuant to the Order of the Court in the civil case, certain restrictions were placed on the use of material discovered therein, and Civic has alleged that those restrictions unduly impeded its ability to file reply pleadings in the renewal and assignment proceedings. Thus, Civic requested an extension of time within which to perfect its reply pleading on the renewal petition to deny until 15 days after the removal or modification of the restrictive Orders. That request was granted by the Commission by Order released May 24, 1973 (40 FCC 2d 1136). Thereafter, on June 29, 1973, Civic requested an extension of time within which to file its reply pleading on the assignment petition to deny for the same period and for the same reasons.

4. In December, 1973, the parties to the civil antitrust suit reached a settlement of that cause, and upon approval of the settlement agreement, all restrictions were removed on the use of material discovered from Carter and Times Herald, and Belo proposed a means by which it would not object to the use of materials discovered from it. There is no indication that Civic attempted to have the Belo protective Orders removed at the time of settlement. On February 13, 1974, the Broadcast Bureau directed Civic to file its reply in the renewal proceeding within fifteen days.[1] Civic, however, contended that it still risked contempt of court citation in using before the Commission material discovered from Belo.

5. Therefore, on March 12, 1974, the Broadcast Bureau informed Civic that its reply in the renewal proceeding should be filed on or before March 18, 1974, noting that if Civic wished to reply on protected material, such material should be identified in Civic's reply pleading. By this procedure, Civic could rely on protected material without risking comtempt of court citation, and the Commission could obtain all relevant information necessary to discharge its statutory responsibility. The procedure outlined in March, 1974, was, therefore, reasonably designed to permit Civic to bring all relevant information to the Commission's attention, and therby clear the way for Commission action in a proceeding which had already consumed almost four years.

6. Accordingly, by February 13, 1974, the Bureau made it clear to Civic that in its view all material restrictions on matters discovered had been removed. Civic sought clarification of that directive which resulted in the procedures outlined on March 12, 1974. Civic did not however seek clarification of its position with regard to the assignment reply. In view of the fact that the assignment extension of time request was based on the Court's restrictions which the Bureau found had been substantially removed in February, 1974, Civic's failure in this regard was clearly unreasonable. Additionally, in March, 1974, the Bureau again directed Civic to file its reply in the renewal proceeding and suggested a method by which that could be safely accomplished. Certainly, at that ime, Civic had actual notice that, in the Commission's view. Civic's ability to file reply pleadings was no longer unduly impeded by the Court's restrictions. The underlying basis for the extensions of time in both the renewal and assignment proceedings had therefore been removed. Civic's continued failure to seek further clarification with respect to the time for filing its reply pleading in the assignment proceeding or to file its replies on the date specified in the Broadcast Bureau's letter of March 12, 1974, or even during the sixty days which passed before our Orders were adop-

1. Inadvertently, however, the Bureau did not specifically dispose of the June 29, 1973 extension of time request by similarly directing Civic to file its reply pleading in the assignment proceeding.

ted, cannot be condoned.[2] Under the foregoing circumstances, we cannot find that Civic was misled by the Commission's oversight in not specifically denying the pending extension of time request in the assignment proceeding.

7. We, therefore, find that Civic's continued failure to perfect its reply between February 13, 1974 and May 13, 1974 was unreasonable. We further find that Civic has failed to offer any new facts to support its contention that its ability to perfect its reply pleading was unduly hampered. We need not, of course, consider again matters which have already been presented, considered and disposed of. *The Spartan Broadcasting Co.*, 22 FCC 2d 920 (1970). Nevertheless, we have reviewed our *Memorandum Opinion and Order*, FCC 74-490, in the light of Civic's petition for reconsideration, to determine whether we erred in reaching our determinations therein. Based on that review, we find no reason to disaffirm our earlier decision and, thus, Civic's petition will be denied.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration filed herein by Civic Telecasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
Vincent J. Mullins, *Secretary*.

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2. We also note that Civic should have set forth in the instant petition for reconsideration those specific factual allegations which it would earlier have alleged in its reply pleading. The petitioner, without explanation, opted not to do so. If Civic has any new information which should be considered by the Commission in this matter, it should have supplied that information in the petition for reconsideration. See Section 1.106 of the Commission's Rules.

No. 75-1471

In the Supreme Court of the United States

OCTOBER TERM, 1975

CIVIC TELECASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1471

CIVIC TELECASTING CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 523 F.2d 1185. The Memorandum Opinions and Orders of the Commission (Pet. App. 10a-43a) are reported at 46 FCC 2d 1075; 46 FCC 2d 1099. The Memorandum Opinions and Orders denying reconsideration (Pet. App. 44a-52a) are reported at 48 FCC 2d 669; 48 FCC 2d 693.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1975. A petition for rehearing and suggestion of rehearing *en banc* was denied by orders of January 8, 1976. A petition for a writ of certiorari was first filed on February 25, 1976, but the Clerk

returned it because it did not comply with this Court's Rules.[1] The petition was refiled on April 13, 1976, and docketed as of February 25, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 309 of the Communications Act of 1934, the Federal Communications Commission must conduct an investigation or hold a hearing when a petition to deny an application fails to raise substantial and material questions of fact indicating that the granting of the application would be inconsistent with the public interest, convenience and necessity, and the Commission has no reason to believe that a hearing may develop evidence of such inconsistency.

STATEMENT

In 1971 petitioner Civic Telecasting Corporation filed with the Federal Communications Commission a petition to deny the license renewal applications of Carter Publications, Inc., the A.H. Belo Corp., and the Times-Herald Printing Co., licensees operating radio and television stations in the Fort Worth/Dallas metropolitan area.[2] The petition to deny contended that the licensees had conspired to obstruct CATV and UHF television development in the Fort Worth/Dallas area and engaged in anticompetitive practices injurious to the public interest (Pet. App. 19a-34a). At that time, petitioner's principals (through another corporation) were plaintiffs in a pending

[1]The tendered petition was not signed by a member of the Bar of this Court, and was not printed in accordance with Rule 39 of the Supreme Court Rules.

[2]Petitioner later filed a petition to deny the applications covering Carter's assignment of its licenses to other parties.

antitrust suit against Belo and Times-Herald in which Carter was later named as a co-conspirator (Pet. App. 12a-13a).

The licensees denied in detail all of the allegations in the petition to deny. In its response, petitioner informed the Commission that it had obtained information supporting its allegations through discovery in its principal's antitrust litigation against the licensees, but that it was precluded by court order from disclosing that information to the Commission. Since it appeared to the Commission that petitioner had been unduly inhibited from perfecting its responsive pleading, the Commission deferred action on the petition in order to explore various alternatives for permitting petitioner to use the protected information to perfect its pleadings (Pet. App. 8a-9a, 13a-14a).

Subsequently, Carter and Times-Herald obtained the removal of any judicial restraints covering the use of information discovered from them. Belo still desired to preserve the confidential nature of certain material discovered from it, but represented that it would interpose no objection to petitioner's use of the material before the Commission (Pet. App. 15a-16a). Concluding that petitioner was no longer restrained from presenting to it the information allegedly discovered in the antitrust suit, the Commission directed petitioner to perfect its response. When petitioner expressed fear that some of the information was still covered by court protective orders, the Commission directed petitioner to come forward with the information it thought it could safely disclose, and allowed it the alternative of identifying any documents which it felt remained subject to judicial disclosure prohibitions (Pet. App. 16a-17a). Petitioner declined to follow either alternative.

In these circumstances, the Commission found that petitioner's unwillingness to perfect its response—even to the extent of identifying the allegedly relevant information and appropriate protective order—was unreasonable. Since it appeared that petitioner had no additional information which might reflect on the licensees' qualifications, the Commission determined that the proceeding should be resolved on the pleadings before it (Pet. App. 16a-18a).

In a detailed analysis of the pleadings, the Commission concluded that petitioner had "not raised substantial and material questions of fact which establish a *prima facie* case for denial of the * * * license renewal applications" (Pet. App. 30a), and that an evidentiary hearing therefore was not warranted. It denied the petitions to deny and granted the license renewal and assignment applications (Pet. App. 19a-43a). Although petitioner sought reconsideration, its petitions for reconsideration presented no new information and were denied (Pet. App. 44a-52a).

The court of appeals affirmed. Discussing first the procedural question, it agreed with the Commission that most of the previously protected evidence had been released for use by petitioner in the renewal proceedings, that petitioner had made no timely effort to seek clarification from the trial court as to what, if any, material might still not be disclosed, and that petitioner presented no reasonable basis for its failure at least to identify the relevant documents and the protective order prohibiting their disclosure (Pet. App. 4a). The court therefore concluded that the Commission's determination to act on the pleadings, after petitioner refused to comply with the requirements for specific allegations of fact supported by affidavits prescribed by Section 309(d) of the Communications Act, reflected a proper regard for protecting

the "interests of orderly administration and finality" (Pet. App. 4a-6a). Turning to the merits of the Commission's decision to renew the licenses, the court held that the Commission's detailed analyses rejecting petitioner's claims were "clearly not unreasonable in light of the evidence presented," and that the Commission had "accurately determined that there were no substantial and material issues requiring a hearing" (Pet. App. 7a).

ARGUMENT

The decision of the court of appeals is correct and presents no question of general importance requiring review by this Court.

As noted by the court of appeals (Pet. App. 1a-2a), petitioner's primary contention is that the Commission must conduct its own investigation or hold a hearing even when a petition to deny fails to present sufficient facts to indicate that renewal would not serve the public interest, convenience and necessity.[3] There is no statutory or decisional support for this contention. As the court of appeals pointed out, this broad duty would "not only place an impossible burden on the FCC but it would also contravene the license renewal procedures outlined in the Communications Act and the regulations promulgated thereunder [47 C.F.R. 1.580(i)]" (Pet. App. 5a) (citation omitted).

Section 309(d) of the Communications Act, 47 U.S.C. 309(d), plainly requires that a petition to deny a license renewal application must contain specific allegations of fact, supported, except where official notice may be taken, by affidavit of a person or persons with personal knowledge thereof, sufficient to show that a grant of the application would be *prima facie* inconsistent with the

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[3]The petition does not contend that the petition to deny presented sufficient facts to require an evidentiary hearing.

public interest. The license may be renewed without a hearing, upon a determination by the Commission "that there are no substantial and material questions of fact and that a grant of the application would be consistent with" the public interest, convenience and necessity. Section 309(d)(2), 47 U.S.C. 309(d)(2). Congress intended to place the burden of showing facts justifying a hearing on the party opposing renewal. This is made manifest by the legislative history accompanying the 1960 amendment which gave Section 309(d) its present form. 74 Stat. 889. That history unmistakably reflects an intent to require a substantially stronger showing, of greater probative value, than was necessary under the former statutory procedure. S. Rep. No. 690, 86 Cong., 1st Sess. 3 (1959); *Stone* v. *Federal Communications Commission,* 466 F.2d 316, 321-323 (C.A. D.C.); see *Columbus Broadcasting Coalition* v. *Federal Communications Commission,* 505 F.2d 320, 323-324 (C.A. D.C.).

The cases cited by petitioner do not support its contention that the Commission failed to fulfill its statutory obligation here. They address the Commission's obligation to conduct an investigation based on specific evidence presented, or under circumstances where the Commission has reason to believe that a hearing may develop evidence not in the possession of the complainant. See, *e.g., Office of Communication of the United Church of Christ* v. *Federal Communications Commission,* 425 F.2d 543, 546-547 (C.A. D.C.); *Clarksburg Publishing Co.* v. *Federal Communications Commission,* 225 F.2d 511, 515 (C.A. D.C.). This is not such a case. The only confirmed "adverse" information possessed by the Commission was that petitioner's principals had filed a private antitrust suit against the renewal applicants, and that the suit had been settled without any admission of liability (Pet. App. 15a). Those circumstances, standing

alone, were not sufficient to cause the Commission to believe that renewal would not serve the public interest. Petitioner's principals, who had possession of all the allegedly relevant information, refused, as the court of appeals pointed out, "to come forward with the information and, more important, made no effort to accept the FCC's recommended alternative of indicating which documents were protected and necessary for agency review" (Pet. App. 2a-3a). As the court emphasized, petitioner's refusal to identify the material it had in its possession did not even allow the Commission "some basis for belief that the damaging information did exist" (Pet. App. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission.

JUNE 1976.

DOJ-1976-06

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1471

CIVIC TELECASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF IN OPPOSITION FOR RESPONDENTS CAPITAL CITIES COMMUNICATIONS, INC., AMON G. CARTER, JR., AND NORTH TEXAS BROADCASTING CORPORATION

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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No. 75-1471

CIVIC TELECASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF IN OPPOSITION FOR RESPONDENTS CAPITAL CITIES COMMUNICATIONS, INC., AMON G. CARTER, JR., AND NORTH TEXAS BROADCASTING CORPORATION

OPINIONS BELOW

The court of appeals' opinion is officially reported at 523 F.2d 1185 (1975) and appears in the Appendix to the Petition. (App. 1a-7a.)[1] The orders of the Federal Communications Commission are officially reported at 46 F.C.C.2d 1075, *reconsideration denied*, 48 F.C.C.2d 669 (1974), and 46 F.C.C.2d 1099, *reconsideration denied*,

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[1] "App. ——" citations are to the Appendix to the Petition for Writ of Certiorari.

48 F.C.C.2d 693 (1974). They also appear in the Appendix to the Petition. (App. 10a-52a.)

JURISDICTION

The court of appeals' judgment was entered on November 28, 1975. A petition for rehearing en banc was denied on January 8, 1976. A properly printed petition for a writ of certiorari reflecting the name of a member of the Bar of this Court as counsel was first filed on April 13, 1976, 96 days thereafter.[2] Jurisdiction of this Court properly may be invoked under 28 U.S.C. § 1254 (1) (1970).

QUESTION PRESENTED

Whether the court of appeals erred in affirming orders of the Federal Communications Commission (the "Commission") granting applications for renewal and assignment of broadcast station licenses on the basis of a determination that there were no substantial and material questions of fact requiring a hearing.

STATUTE INVOLVED

The relevant statutory provision, section 309(d) of the Communications Act of 1934 (the "Communications Act"), 47 U.S.C. § 309(d) (1970) provides:

> "(1) Any party in interest may file with the Commission a petition to deny any application (whether

[2] The petition was first filed on February 25, 1976. The Clerk returned it for failure to comply with the printing requirements of U.S. Supreme Court Rule 39 and for failure to show on the cover the name of a member of the Bar of the Supreme Court as required by the same rule. On March 25, 1976, petitioner's motion for leave to proceed *in forma pauperis* and *pro se* was denied. As of that date, there remained 13 days in which to file a timely petition or to move for an extension of time. Because of petitioner's failure to do either, the petition should be dismissed as untimely. *See* 28 U.S.C. § 2101 (1970).

> as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.
>
> "(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial or material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section."

STATEMENT OF THE CASE

This case arises from petitions filed with the Commission by Civic Telecasting Corporation ("Civic") seeking denial of eleven broadcast applications filed by five different parties on the basis of facts allegedly in Civic's possession but which Civic consistently failed to disclose to the Commission.

Civic's first petition to deny, dated June 30, 1971, sought denial of the applications for broadcast license renewal filed by three Dallas-Fort Worth licensees [3] on the ground that the licensees had conspired to obstruct the development of community antenna television and UHF television in the Dallas-Fort Worth market. Petitioner attempted to support these allegations with information discovered in an antitrust suit which had been brought against two of the licensees [4] on September 9, 1970, by another corporation owned by petitioner's principals. On September 10, 1971, the broadcast licensees filed oppositions to the Civic petition. The oppositions each included affidavits denying petitioner's allega-

[3] The licensees were Carter Publications, Inc. ("Carter"), licensee of WBAP (AM, FM and TV), Fort Worth, and publisher of the *Fort Worth Star Telegram*; A. H. Belo Corporation, licensee of WFAA (AM, FM and TV), Dallas, and KFDM-TV, Beaumont, and publisher of the *Dallas Morning News*; and Times Herald Printing Company, licensee of KDFW-TV, Dallas, and publisher of the *Dallas Times Herald*.

[4] Respondent Carter was named as co-conspirator in that suit, but not a party defendant.

The Commission considers violations of the antitrust laws as bearing on an applicant's character qualifications to be a Commission licensee. *Establishment of a Uniform Policy To Be Followed in Licensing of Radio Broadcast Stations Cases in Connection With Violations by an Applicant of Laws of the U.S. Other Than The Communications Act of 1934, As Amended,* Docket No. 9572, 42 F.C.C.2d 399, 401 (1951). Such violations are not automatically disqualifying, but the circumstances are taken into account along with all other relevant factors when the licensing decision is made. *Id.*

tions and explaining in detail the conduct from which petitioner sought to draw inferences of improper activity. (*See, e.g.*, App. 21a, 25a.) Petitioner thereafter contended that, because of protective orders entered by the district court in the antitrust proceeding on September 30, 1971, it was unable to complete its reply pleading and provide further "damaging information" in support of its allegations of anticompetitive conduct. (App. 4a.)

While Civic's petition to deny the above-described renewal applications was pending, respondent Carter entered into agreements to assign its Fort Worth newspaper and broadcast stations to respondents Capital Cities Communications, Inc. and North Texas Broadcasting Corporation, and in early 1973, pursuant to section 310 of the Communications Act, the parties filed applications with the Commission seeking the agency's approval of the broadcast assignments. *See* 47 U.S.C. § 310 (d) (Supp. IV, 1974). Civic then filed its second petition to deny, this time seeking denial of the assignment applications, on the ground *inter alia* that Carter was not qualified to assign the licenses because of its participation in the alleged anticompetitive activities.

In an order released on May 23, 1973, the Commission made clear that it would not act on the petitions to deny—or the applications for renewal and assignment pending before it—until petitioner was no longer inhibited by the antitrust protective orders in its efforts to utilize the discovered materials to perfect its pleadings. (App. 9a.) As the Commission subsequently found (App. 16a-17a), the protective orders were later modified or waived so that the petitioner was no longer prohibited from providing to the Commission any relevant information that petitioner claimed to have discovered in the antitrust proceeding. (App. 2a n.1, 18a.) On February 13, 1974, the Commission staff accordingly

ordered petitioner to proceed by perfecting its responsive pleadings.[5]

Nevertheless, petitioner asserted that ambiguities remained in the district court's orders lifting the protective decrees, and it continued to insist that it could not provide further information to the Commission. The Commission made additional efforts to obtain further information from petitioner, and it requested that, if petitioner could not provide the specific evidence on which it desired to rely, it at least identify the relevant documents and material which it was prevented from disclosing. Petitioner failed to provide any further information, and, on May 13, 1974, the Commission concluded that "[p]etitioner's unwillingness to perfect its responsive pleading . . . is unreasonable, and the Commission will not allow this proceeding to be further prolonged." (App. 18a.)[6]

The Commission thereupon reviewed petitioner's charges, the information which petitioner had provided and the licensees' sworn responses thereto, and it determined that there were no substantial or material questions of facts bearing adversely on the licensees' conduct. On the basis of that finding, and pursuant to Section 309(d) of the Communications Act, the Commission denied the petitions to deny and granted the applications here involved.[7] Petitioner thereafter sought reconsidera-

[5] On February 1, 1974, the antitrust suit had been dismissed pursuant to a negotiated settlement. The Court order dismissing the suit stated that there was insufficient evidence to establish that the licensees had engaged in unlawful practices. (App. 15a.)

[6] Petitioner made no efforts to obtain clarification of the protective orders until after the Commission had acted. (App. 47a n.5.)

[7] App. 19a-30a, 35a, 43a. This case involves only those orders of the Commission granting renewal of Carter's radio and television licenses and authorizing their assignment to respondents Capital Cities and North Texas respectively.

tion of the Commission's action, but even in its petitions for reconsideration it neither provided information in support of its allegations nor identified the discovered, but allegedly protected, documents on which it desired to rely. Reconsideration was also denied, and petitioner appealed.

After careful review of the Commission's opinion, the court of appeals concluded, unanimously and *per curiam*, that the Commission had "correctly determined that Civic had unreasonably refused to come forward with the promised damaging information" and that "on the facts and allegations before it," and in light of the Commission's "detailed analyses" of petitioner's claims, the Commission reasonably granted the applications without a hearing. (App. 3a, 6a-7a.) The court found that petitioner was in fact contending that the Commission had a "broad duty" to

> "launch its own full-scale investigation, or schedule a hearing whenever a petition to deny *failed* to present facts sufficient to indicate a substantial question that the renewal would not serve the public interest, convenience and necessity." (App. 1a-2a, emphasis supplied.)

In light of petitioner's refusal either to present evidence or to itemize the documents that it was prevented from utilizing, the court concluded that petitioner's suggestion in the context of this case "would not only place an impossible burden on the . . . [Commission] but it would also contravene the license renewal procedures outlined in the Communications Act . . . ." (App. 5a.) The court affirmed the Commission.

ARGUMENT

This case meets none of the traditional criteria for grant of a writ of certiorari.[8] It constitutes, rather, an

[8] *See* U.S. Sup. Ct. R. 19.

attempt to obtain Supreme Court review of a carefully reasoned court of appeals determination, made in accordance with well-established standards of review, that an administrative agency acted properly in rejecting unsubstantiated allegations regarding licensee conduct.

Petitioner attempts to bring this case within the criteria set forth in Rule 19 by asserting that it presents "important questions of federal law which have not been, but should be, settled by this Court." But the questions decided by the court below—rather than raising novel questions of law—were simply:

> "(1) whether the FCC correctly determined that Civic had unreasonably refused to come forward with the promised damaging information to support its allegations; and (2) whether, on the facts and allegations before it, the FCC could reasonably have granted the renewal without a hearing." (App. 3a.)

Petitioner does not directly challenge the court's resolution of these two questions. Rather, it argues that—notwithstanding petitioner's failure to raise any substantial question of fact with regard to the licensees' qualifications—the Commission should have initiated its own full-scale investigation of petitioner's charges and required the licensees involved to turn over all of the material discovered by petitioner's principals in the antitrust proceeding. The court below could not, "under the facts of this case, perceive any reason for so burdening the agency" (App. 2a), and that conclusion is clearly supported by applicable statutory standards.

Section 309(d)(1) of the Communications Act requires that a petition to deny an application for renewal or assignment of a broadcast license contain "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent" with the public interest, convenience and necessity. That

section also gives licensees the right to respond to petitions to deny. *Id.* Section 309(d)(2) provides:

> "If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant . . . ."

Only if the Commission cannot make those findings must a hearing be held.[9] The Commission found, and the court below (applying traditional legal standards) affirmed, that Civic's petition had failed to meet the threshhold burden of raising such a fact question.

To be sure, as petitioner notes, the Commission also has the duty to go beyond bare petitions before it and inquire into any matters relevant to a licensee's qualifications "where the Commission has reason to believe, either from the protest or its own files, *that a full . . . hearing may develop other relevant information not in*

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[9] *Id.; accord, Columbus Broadcasting Coalition* v. *FCC*, 164 U.S. App. D.C. 213, 505 F.2d 320 (1974); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F.2d 316 (1972); *Marsh* v. *FCC*, 140 U.S. App. D.C. 384, 436 F.2d 132 (1970). Section 309(d) was amended in 1960. The Congressional purpose in adopting the present language was to require that a petition to deny make

> "a substantially stronger showing of greater probative value than is now necessary in the case of a post-grant [of initial license] protest." S. Rep. No. 690, 86th Cong., 1st Sess. 3 (1959).

Formerly, the showing required was

> "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding." *Federal Broadcasting System, Inc.* v. *FCC*, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563 (1955) (footnote omitted).

the possession of the protestant." *Clarksburg Publishing Co.* v. *FCC*, 96 U.S. App. D.C. 211, 215, 225 F.2d 511, 515 (1955) (emphasis added). Here, the Commission carefully reviewed the evidence before it; concluded that petitioner's failure to produce information which was in its possession was unreasonable; and found that the licensees had "adequately dispelled" any relevant inferences that could be drawn from the facts alleged by petitioner. (App. 30a.) Under these circumstances, it is clear that the *Clarksburg* standard was met. The Commission had no reason to believe that a hearing would produce information relevant to the charges. The court below carefully reviewed that determination and there is no reason for further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be dismissed as untimely or denied.

Respectfully submitted,

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